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WASHINGTON REPORTS

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CASES DETERMINED

IN THE

SUPREME COURT

OF

WASHINGTON

JUNE 3, 1913 — AUGUST 12, 1913

ARTHUR REMINGTON

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OF THE
SUPREME COURT OF WASHINGTON

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*Appointed June 11, 1913, in compliance with Laws 1913, ch. 17, p. 47.

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ERRATA

- Page 16, line 5 from top, for 31 read 139
 Page 19, line 10 from top, for § 16, art. 5 read art. 16, § 5
 Page 179, first syllabus, last line, for superior read supreme
 Page 612, line 1, for chap. 22 read chap. 42

CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 10560. Department One. June 3, 1913.]

ARNOLD A. ZBINDEN *et al.*, *Appellants*, v. THE CITY OF
SEATTLE *et al.*, *Respondents*.¹

INTOXICATING LIQUORS — LICENSES—REGULATION—SALOON "FRONT-
ING" ON STREET. A saloon, the main entrance of which is directly
opposite the entrance of a hotel lobby opening upon a street, and
thus directly upon the street through the unobstructed hotel lobby,
"fronts" upon such street, although it is eighty feet distant from the
street, within the meaning and spirit of an ordinance prohibiting the
granting of more than two saloon licenses in the same block "front-
ing on the same street."

Appeal from a judgment of the superior court for King
county, Dykeman, J., entered July 8, 1912, dismissing an ac-
tion to compel the issuance of a saloon license, after a trial on
the merits. Affirmed.

Scott Calhoun, for appellants.

James E. Bradford and *C. B. White*, for respondents.

PARKER, J.—The plaintiffs seek to enforce their claimed
right to maintain a saloon in a room on the ground floor of
the premises known as No. 511 Third avenue, in the city of
Seattle, under an alleged lawful granting of a license therefor
by the city council of that city. A trial upon the merits in
the superior court resulted in a judgment denying to the
plaintiffs the relief prayed for, from which they have ap-
pealed.

¹Reported in 132 Pac. 637.

The correctness of the position taken by the executive officers of the city in denying to appellants the right to maintain a saloon at the location involved depends upon whether the maintaining of the saloon at that location would be in violation of the following provisions of the city charter limiting the power of the city council to grant saloon licenses:

“Within the saloon patrol districts herein described, . . . no license shall hereafter be granted which shall make the number of licensed places situated on the same block of land and fronting on the same street exceed two (including herein basements as well as other premises and counting all kinds of liquor licenses).”

In July, 1911, appellants procured from the city authorities a transfer of their saloon license from outside of the block which includes the location in question to the rear on the ground floor of the Seward hotel, at 511 Third avenue. At that time, there were in lawful operation under licenses two saloons in the same block, both of which fronted upon Third avenue. Appellants' transferred license expired on April 7, 1912, the other saloons still being lawfully operated under licenses. Shortly prior thereto, the appellants applied to the city council for renewal of their transferred license at the same location. The city council passed an ordinance granting such renewal, which was vetoed by the mayor, and was thereafter passed over the mayor's veto. The city comptroller refused to issue the license in compliance with this ordinance, and the mayor and chief of police closed appellants' saloon and denied them the right to operate it at that location. This action was thereupon instituted to compel the comptroller to issue the license, and to enjoin the mayor and chief of police from interfering with appellants' right to operate the saloon.

The only question here involved is, Would this saloon, if permitted to be operated in the location in question, front upon Third avenue, in violation of the charter provision above quoted, in view of there being two other lawfully operated

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saloons in the same block fronting upon that street. From a plat introduced in evidence of the ground floor of that portion of the hotel known as No. 511 Third avenue, the correctness of which is not challenged, the saloon location relative to Third avenue is clearly shown. The saloon is in the rear of the hotel lobby, which fronts directly upon the street. From the street entrance of the hotel lobby back to the door, which opens from the lobby into the saloon, is about eighty feet. The street entrance to the lobby and the entrance to the saloon from the lobby are exactly opposite each other and there are no partitions or other obstacles intervening. At the side of the hotel lobby, on the left as one enters and proceeds back to the saloon entrance, there is a cigar stand, an elevator, the hotel office and stairs ascending from the lobby, but none of these obstruct the view or the direct passage from the street entrance to the entrance to the saloon from the hotel lobby.

We are of the opinion that the learned trial court correctly held that, to permit the maintaining of a saloon in this location while there were two other lawfully conducted saloons in the same block fronting upon Third avenue, would be a violation of the spirit of the charter provision above quoted. It is apparent that the main entrance to this saloon is directly from Third avenue through the unobstructed hotel lobby, although the street and saloon doors are some eighty feet distant from each other.

The judgment is affirmed.

Crow, C. J., Mount, Gose, and Chadwick, JJ., concur.

[No. 10890. Department One. June 3, 1913.]

THE CITY OF SPOKANE, *Respondent*, v. W. M. RIDPATH *et al.*,
Appellants.¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—PETITION — SIGNATURES — JURISDICTION TO ORDER IMPROVEMENT. That an initiatory petition for an improvement was not signed by a majority of the property owners, as required by the city charter, is not a jurisdictional defect where the charter also authorized the improvement without such signatures if ordered by a two-thirds vote of the council, and the council afterwards ordered the improvement by a unanimous vote.

SAME—PROCEEDINGS—"RESOLUTION" — NECESSITY. A charter provision requiring a city council ordering an improvement to direct the board of public works, "by resolution" to prepare a report, is substantially complied with by ordering such report "on motion"; there being, in substance, no difference between a resolution and a motion.

SAME—ASSESSMENTS—VALIDITY—PRIOR EMINENT DOMAIN PROCEEDINGS—NECESSITY. The failure of a city to acquire, by eminent domain proceedings, the right to change the grade of a street, does not invalidate an assessment to defray the cost of making the improvement, and cannot be urged as a defense to an action to foreclose the lien of the assessment.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered December 2, 1911, upon findings in favor of the plaintiff, in an action to foreclose special assessment liens. Affirmed.

D. W. Henley, for appellants.

H. M. Stephens and *Arthur L. Hooper*, for respondent.

PARKER, J.—This is an action to foreclose liens for special assessments, levied upon abutting property to pay the cost of improving, "by regrading, curbing and sidewalking," a portion of Sixth avenue in the city of Spokane. A decree being rendered by the trial court in favor of the city, as prayed for, certain of the defendants have appealed. We think the record

¹Reported in 132 Pac. 638.

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warrants us in proceeding upon the theory that the controlling facts involved are not subject to controversy.

About the year 1888, the city having established the grade of Sixth avenue in front of appellants' property, graded the avenue accordingly, but evidently did not then lay sidewalks thereon. Thereafter appellants improved their property by grading their lawns with reference to the grade then established. Thereafter, in the fall of 1904, a petition was filed with the city authorities asking for the parking and sidewalk-ing of Sixth avenue, including the portion thereof in front of appellants' property. This petition was signed by certain owners of property fronting upon the avenue, but such owners were the owners of less than "one-half of the property subject to contribute to such improvement." In this respect the petition was insufficient as an initiatory step in the making of the proposed improvement, as will appear by reference to certain charter provisions to be hereafter noticed. Thereafter, on December 27, 1904, the board of public works of the city submitted this petition to the city council, together with plans and specifications for "regrading, curbing and sidewalk-ing" the portion of the avenue asked to be improved, and recommended that the improvement be made. At the same time, the board of public works submitted to the city council an ordinance to reestablish the grade of Sixth avenue, including the portion thereof proposed to be improved, and recommended its passage. Thereafter, on January 10, 1905, the city council passed the ordinance reestablishing the grade of Sixth avenue, the grade thus established being from six to twenty inches lower than the previously established grade. Thereafter, on February 28, 1905, the city council instructed the board of public works "to prepare new plans and specifications for the sidewalking and curbing" of the portion of Sixth avenue proposed to be improved. Thereafter, on March 28, the board of public works made its report to the city council and submitted new plans and specifications which were then approved by the city council. Thereafter, on April 5,

1905, an ordinance was passed by the city council providing for the construction of the improvement according to the plans and specifications which had been approved by the council on March 28, 1905, and also providing for the creation of a local improvement district and the levying of special assessments upon the property therein, including the property of appellants, to pay the cost of the improvement. This ordinance was passed by the unanimous vote of the city council. Thereafter the improvement was constructed, and an assessment roll made and filed in the usual manner, apportioning and charging the cost of the improvement to the several lots and parcels of land within the improvement district, and upon due notice given to the property owners as the law directs, there being no protest or objection made to any of the assessments, the same were duly confirmed by the council by ordinance passed on September 6, 1905. It is to foreclose the liens of certain unpaid assessments so made, that this action is prosecuted.

The argument of counsel for the appellants proceeds upon the theory that the city council never acquired jurisdiction to construct this improvement and pay for it by local assessments levied upon the property of appellants and others. To support this theory, two principal contentions are advanced: first, that the making of the improvement upon the local assessment plan was not initiated in the manner provided by the charter so as to give the council jurisdiction to proceed therewith; and second, that the making of the improvement upon the regrade of the avenue, claimed to be materially different from the previously established grade, without first acquiring the right by eminent domain proceedings as against appellant and other property owners to construct the improvement upon the new grade, was an omission of a prerequisite jurisdictional step to the making of the improvement and levying of the assessment.

The first of these contentions is rested upon the following provisions of the then existing charter of the city of Spokane:

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"Sec. 61. . . . No improvement, where the whole or any portion of the cost and expense thereof is to be defrayed by the collection of special assessments upon the property specially benefited thereby, shall be ordered unless the owners of at least one-half of the property subject to contribute to such improvement, shall file a petition therefor; *provided*, that the legal representatives of such owners may sign such petition for and on behalf of the owners; *provided further*, that such improvement may be ordered without petition by an ordinance which shall have passed by a vote of at least two-thirds of the whole council."

"Sec. 62. . . . Whenever, in the absence of any petition, the council shall deem it advisable to order such improvement, it shall by resolution direct the board of public works to prepare and transmit a report of such work; and said board shall thereupon prepare and file such report in the same manner as if there had been a petition therefor and favorable report by the board."

It is insisted that, because the petition for the improvement which was filed in the fall of 1904 was insufficient as an initiatory step, in view of its want of sufficient number of signatures of the owners, all subsequent proceedings looking to the making of the improvement and levying of the assessment must fall. Admitting, for argument's sake only, that a petition with a sufficient number of signatures might become a necessary jurisdictional step in the absence of the improvement being ordered by ordinance passed by at least a two-thirds vote of the whole council, it seems to us that, in view of the fact that the council did eventually order this improvement by an ordinance passed by its unanimous vote, it thereafter became immaterial that the petition filed some months previous asking for the improvement happens to be defective. We are quite unable to see how what may have been previously done by the property owners in the way of attempting to properly petition for this improvement can in any degree lessen the power of the council to order the improvement by an ordinance passed by a unanimous vote, as

they are clearly authorized to do by the provisions of § 61 of the charter above quoted.

It is also insisted that, viewed as an improvement ordered by the council without petition from the property owners, the council did not "by resolution direct the board of public works to prepare and transmit a report of such work," as provided by § 62 of the charter above quoted. Even admitting that this provision of the charter is more than merely directory in its force, we have noticed that, on February 28, 1905, before the ordering of the improvement by the ordinance passed by unanimous vote, the council instructed the board of public works to prepare new plans and specifications for the improvement, the board having previously recommended the making of the improvement. It is true that this action of the council appears in its record in the form of an informal motion made and carried, rather than in the form of a resolution. It seems, however, that in substance there is no difference between a resolution and a motion. Indeed, the terms are practically synonymous. 34 Cyc. 1667; Black's Law Dictionary, 1027. We think this action of the council previous to the final ordering of the improvement by ordinance by unanimous vote complied with the spirit of the charter provisions above quoted.

The remaining question is, did the failure of the city to acquire the right to change the grade of Sixth avenue, assuming that the change was material, by eminent domain proceedings, affect the validity of the assessment? It seems clear that the levying of the assessment to defray the costs of making the improvement was an exercise of the taxing power, which is a wholly different power from that of eminent domain. If appellants were damaged by the change of this grade, it is manifest that their rights in that regard were subject to protection in an eminent domain proceeding, or by interference in their behalf by a court of equity enjoining the change of grade, or by a suit for damages; but the fact that they may have been damaged by change of the grade, if

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any such damages have been suffered by them, does not affect the city's power to levy the assessments here involved. A similar contention to that made by the appellants here was disposed of by the supreme court of California in *Hornung v. McCarthy*, 126 Cal. 17, 58 Pac. 303, where a constitutional eminent domain provision similar to our own was invoked. The court said:

“ ‘Looking at this defense from the most favorable standpoint, it is evident that it is untenable. The section of the constitution just quoted refers to, and is intended to regulate, the exercise of the right of eminent domain; whereas special assessments for local improvements, such as the tax bills before us, are referable to and sustainable under the taxing power. This distinction is well recognized both here and elsewhere in the United States (*Garrett v. St. Louis*, 25 Mo. 505, 69 Am. Dec. 475; *Lewis on Eminent Domain*, § 5). If the taxing power has been called into play in the mode required by law for the purpose of paying for a local improvement, such as paving or grading a street, it is no defense to a bill issued therefor to say, as is said here, that the street, or the improvement, damaged and did not benefit the property, though, if such were the fact, the party might have his action (on a proper showing) under the constitution for such injury. (*Householder v. Kansas*, 83 Mo. 488.) If the city had invoked the power of eminent domain unlawfully in the premises, it could be held actionable therefor, but that would not interfere with the collection of the special tax bill for an improvement regularly made under the taxing power. The right of action which a person would thus have against the municipality would constitute no just defense to the claims of the contractor who had made the improvement and to whom, under the law in question, the tax assessment is payable.’ Our conclusion is, that the assessment was not void upon the grounds above noted.”

No other authority has come to our notice out of harmony with this view, while the following may be cited in support of it: *Lewis, Eminent Domain* (3d ed.), § 5; *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661; *Engelbretsen v. Gay*, 158 Cal. 27, 109 Pac. 879; *Barfield v. Gleason*, 111 Ky. 491, 23 Ky. Law 128, 63 S. W. 964; *Louisville Steam Forge Co.*

v. Mehler, 112 Ky. 438, 64 S. W. 396, 652; *In re Cruger*, 84 N. Y. 619.

It might well be argued, notwithstanding we might regard the contentions made by counsel for appellants as establishing the irregularities they claim in the initiation of this improvement, that, in view of the fact that the assessment was confirmed upon due notice, without objection upon the part of any of the property owners, the validity of the assessment as against all of such defects and irregularities was finally adjudicated in favor of the city upon its confirmation by the city council. Rem. & Bal. Code, §§ 7532, 7533; *Rucker Bros. v. Everett*, 66 Wash. 366, 119 Pac. 807, 38 L. R. A. (N. S.) 582. However, in view of what has been said, we need not pursue the inquiry along these lines further.

The judgment is affirmed.

CROW, C. J., MOUNT, CHADWICK, and GOSE, JJ., concur.

[No. 10606. Department One. June 4, 1913.]

CONTINENTAL DISTRIBUTING COMPANY, *Appellant*, v.
JANE SMITH *et al.*, *Respondents*.¹

TAXATION — FORECLOSURE — VALIDITY — DESCRIPTION OF LOTS. The fact that property was assessed on the tax rolls as in Squire city instead of in the town of Springdale, to which the name had been changed by legislative act, does not invalidate tax foreclosure proceedings, as against one who took the property by deed describing it as located in "Springdale, formerly Squire City."

SAME — SUMMONS — NAME OF OWNER. A general county tax foreclosure being a proceeding *in rem*, it is immaterial, if the property is properly described, what name or names of the owners are used in the notice.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered January 5, 1912, dismissing an action to set aside a tax deed and quiet title, after a trial on the merits. Affirmed.

¹Reported in 132 Pac. 631.

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Opinion Per Crow, C. J.

Fred M. Williams, R. M. Webster, and Jackson & Bailey,
for appellant.

Jesseph & Grinstead, for respondents.

Crow, C. J.—This action was commenced by the Continental Distributing Company, a corporation, against the widow, heirs at law, and administratrix of the estate of O. T. Smith, deceased, to set aside a tax deed and quiet plaintiff's title to the east half of lot seven in block four in the town of Squire City (now Springdale), Stevens county, Washington. From a judgment and decree in defendants' favor the plaintiff has appealed.

The lot, one-half of which is now in question, was originally platted as lot seven, in block four, of the town of Squire City. In 1895, the legislature changed the name of Squire City to Springdale. Laws 1895, ch. 54, page 97. Taxes for 1902, which were levied upon the half lot under the name of Squire City, and in the name of W. D. Storer as owner, became delinquent. In September, 1908, Stevens county commenced a general tax foreclosure against this property and other lots and tracts, upon a delinquency certificate theretofore issued to the county. In all these foreclosure proceedings, save and except the tax deed, the name of the owner appeared as W. B. Storer. A foreclosure decree was entered, sale was made, and on December 5, 1908, a tax deed was issued to O. T. Smith, now deceased. On June 10, 1905, appellant purchased the property from F. R. Bean and Nellie E. Bean, his wife, who then executed and delivered to appellant a warranty deed, describing the real estate as "The east one-half ($\frac{1}{2}$) of lot numbered seven (7), in block numbered four (4), of the original town of Squire City, now Springdale according to the recorded plat thereof." Thereafter, and prior to the tax sale, appellant improved and rented the property. When the tax deed was delivered, O. T. Smith demanded of the tenant that rent be paid to him, which was done. Thereafter negotiations were commenced between ap-

pellant and O. T. Smith for an adjustment, whereby appellant could regain the title. These negotiations failed, and this action was commenced after the death of Mr. Smith.

Many assignments are presented in appellant's brief which raise but two questions: (1) whether the fact that the property was assessed upon the tax rolls as east one-half of lot seven in block four *in Squire City*, instead of *the town of Springdale*, avoided the tax levy, the foreclosure, and the tax deed; and (2) whether the use of the name W. B. Storer in the foreclosure proceedings, instead of the name of W. D. Storer, which appeared on the tax rolls as owner, invalidates the foreclosure and tax deed.

The deed by which appellant acquired title described the property as being located in the "original town of Squire City, now Springdale." This was notice to appellant that the lot as platted was located in Squire City, and that the name had been changed. Appellant seems to rely upon the warranty in the deed executed by its grantors as its excuse for failing to ascertain the fact that the taxes were delinquent. Without regard to this deed, it was appellant's duty to ascertain at its peril whether all taxes had been paid by its grantors. In *Ontario Land Co. v. Yordy*, 44 Wash. 239, 87 Pac. 257, this court held a description used in a tax levy and subsequent foreclosure was sufficient to identify the property and locate the same. It appeared that the taxing officers had used serial numbers for tracts of land they considered to be blocks in harmony with the numbers of other blocks on the original plat, although the property in question had not been subdivided into blocks and lots, but had been marked "reserved." In commenting upon the sufficiency of the description thus adopted, this court said:

"It is a well-established principle of law that a description in a deed, or other instrument affecting title to real estate, is sufficient if it affords an intelligent means for identifying the property, and does not mislead. In other words, if a person of ordinary intelligence and understanding can successfully use the description in an attempt to locate and identify the

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particular property sought to be conveyed, the description answers its purpose and must be held sufficient. . . . When real estate is listed and assessed for taxation, it is ordinarily necessary that the assessment roll shall contain a reasonably accurate description of the tract sought to be taxed. The object of this requirement is stated by writers on taxation and tax titles to be three-fold, (1) it is designed to inform the owner of the claim upon his property; (2) it is designed that intending purchasers may know what property will be offered for sale in the event of the taxes becoming delinquent; and (3) it is also the intention that under such description a proper deed may be executed to the purchaser. Cooley, Taxation (2d ed.), p. 406; Black, Tax Titles (2d ed.), § 112. . . . No person of ordinary intelligence could fail to correctly identify the property intended to be taxed and afterwards conveyed. . . .”

Appellant's second contention, that use of the name of W. B. Storer in the foreclosure proceedings, instead of W. D. Storer which appeared on the tax rolls, constituted a fatal defect, cannot be sustained. The tax foreclosure was a proceeding *in rem* instituted by Stevens county under Rem. & Bal. Code, § 9257, which provides that proceedings in a tax foreclosure prosecuted by a county, shall be the same as when a delinquency certificate is held by an individual, the summons, however, to be served exclusively by publication. It was only requisite that the description of the property which appeared upon the tax roll should be used, which description we have held sufficient to enable any interested party to identify the property here involved. Section 9257, *supra*, further provides:

“The names of the person or persons appearing on the treasurer's rolls as the owner or owners of said property for the purpose of this chapter shall be considered and treated as the owner or owners of said property, and if upon said treasurer's rolls it appears that the owner or owners of said property are unknown, then said property shall be proceeded against, as belonging to an unknown owner or owners as the case may be, and all persons owning or claiming to own, or having or claiming to have an interest therein, are hereby re-

quired to take notice of said proceedings and of any and all steps thereunder." (P. C. 501 § 241).

This court has held such a tax foreclosure to be a proceeding *in rem*, of which the actual owners must take notice. *Spokane Falls & N. R. Co. v. Abitz*, 38 Wash. 8, 80 Pac. 192. In *Noble v. Aune*, 50 Wash. 73, 96 Pac. 688, having under consideration substantially the same question now presented, we said:

"It is contended by appellants that the original tax proceeding was invalid for the reason that the court had no jurisdiction, inasmuch as in the foreclosure proceedings the name of the owner was given as 'Henry Acenie' instead of 'Henry Aune,' as it had appeared in the tax roll for some of the years for which taxes were delinquent. We think this contention cannot be upheld. This court has repeatedly held a tax foreclosure by a county to be a proceeding *in rem*. . . .

"Where a county prosecutes a general foreclosure, it is immaterial what name or names are used in the summons, or whether any is used. The summons is sufficient, in the absence of fraud, if the property is properly described. We recognize a clear distinction between a foreclosure by a county and one by an individual. In the latter case, greater strictness is required—the requirements as to service of summons being much the same as in the foreclosure of a mortgage."

The court had jurisdiction of the foreclosure proceedings, and appellant has shown no irregularity sufficient to avoid the tax sale and deed.

The judgment is affirmed.

PARKER, CHADWICK, MOUNT, and GOSE, JJ., concur.

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Opinion Per PARKER, J.

[No. 11277. *En Banc*. June 7, 1913.]STATE CAPITOL COMMISSION, *Petitioner*, v. STATE BOARD OF
FINANCE *et al.*, *Respondents*.¹

SCHOOLS AND SCHOOL DISTRICTS—SCHOOL FUNDS—INVESTMENT—STATE BONDS. Under Const., art. 16, § 5, and Rem. & Bal. Code, § 5056, authorizing the investment of the permanent school fund in state bonds, the investment cannot be made in state capitol building bonds issued against the capitol building fund to be derived from the sale of the capitol lands, unless the general credit of the state is lawfully pledged to the payment of the principal and interest of the bonds.

STATES—BONDS—VALIDITY—STATE DEBT—LIMITATION—SUBMISSION TO VOTE. Laws 1913, p. 139, § 2, and Laws 1911, p. 323, § 5, providing that the state shall guarantee the principal and interest of the capitol building bonds to be issued against the capitol building fund, pledges the general credit of the state therefor, and hence involves the incurring of a state indebtedness in violation of the prohibition of the Const., art. 8, §§ 1-3; since the bonds provided for exceed the limitation of \$400,000, specified in § 1 for certain indebtedness, and do not fall within § 2 authorizing indebtedness to repel invasion and defend the state in war, and were not authorized by a vote of the people as required by § 3 in the case of all other state indebtedness.

SAME—STATE INDEBTEDNESS—ASSETS—OFFSET. Where the state pledged its general credit for the payment of capitol building bonds to be paid from future sales of the capitol lands, the ascertained value of the capitol lands cannot be offset against the state obligation upon its pledge for the purpose of showing that the state had not in fact incurred any real indebtedness.

Application filed in the supreme court May 12, 1913, for a writ of mandate to the state board of finance. Denied.

Frank C. Owings, for petitioner.

The Attorney General and *R. E. Campbell*, *Assistant*, for respondents.

PARKER, J.—This is an original application in this court wherein the state capitol commission seeks a writ of mandate requiring the state board of finance to comply with its con-

¹Reported in 132 Pac. 861.

tract entered into with the state capitol commission for the purchase, with funds of the permanent school fund of the state, bonds of the face value of \$500,000 to be issued against the capitol building fund, in pursuance of ch. 59, page 319, Laws of 1911, as amended by ch. 50, page 31, Laws of 1913. The state board of finance resists the petition of the capitol commission by demurrer and motion to quash, upon the ground that the petition does not state facts constituting legal ground for the relief prayed for.

The controlling facts alleged in the petition may be briefly stated as follows: On April 29, 1913, the state capitol commission adopted a resolution providing for the immediate execution and sale of negotiable bonds against the capitol building fund, in the total sum of \$4,000,000, payable in twenty years, with interest not exceeding five per cent per annum, and with right reserved in the state to pay or refund the same at the end of any five-year period during the twenty years; and also providing that its secretary advertise for and obtain bids for the purchase of such bonds, and for portions thereof less than the whole. Thereafter the state board of finance adopted a resolution that there should be invested in the proposed issue of capitol building fund bonds \$500,000 of the permanent school fund of the state. This resolution was in substance and effect an offer of the state board of finance to purchase that amount of the bonds, at par, to bear interest at four per cent per annum. Thereafter the state capitol commission adopted a resolution accepting the offer of the state board of finance. Thereafter the state board of finance rescinded its resolution offering to purchase the bonds, and declined to complete the purchase thereof, upon the sole ground that it had been advised by the attorney general that such issuance of the bonds would be in violation of the limitation imposed upon the legal indebtedness of the state by art. 8 of the state constitution.

Prior to the adoption of the resolution of April 29, 1913, by the state capitol commission, providing for the issuance

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of the bonds, that commission had caused the capitol lands, from the sale of which the capitol building fund is to be derived, to be appraised and the total value of those lands to be determined, as provided by ch. 59, page 819, Laws of 1911, which total value so determined is \$5,265,519.47. The state board of finance is authorized by Rem. & Bal. Code, § 5056 (P. C. 485 § 163), to invest the permanent school fund of the state in national, state, county, municipal or school district bonds bearing interest at a rate of not less than three and three-fourths per centum per annum. Section 5 of art. 16 of the state constitution, as amended in November, 1894, provides:

“None of the permanent school fund of this state shall ever be loaned to private persons or corporations, but it may be invested in national, state, county, municipal, or school district bonds.”

This constitutional provision has been held by this court to prohibit the investment of the permanent school fund in any securities other than those enumerated therein, to wit: “national, state, county, municipal, or school district bonds.” *State ex rel. Hellar v. Young*, 21 Wash. 391, 58 Pac. 220; *State ex rel. Port Townsend v. Clausen*, 40 Wash. 95, 82 Pac. 187. In the last cited case, there was involved the question of the investment of the permanent school fund in certain bonds to be issued by the city of Port Townsend, payable only out of a special fund to be derived from the revenues of the city waterworks system. The city did not pledge its credit for such payment. In holding that these bonds were not such bonds as the permanent school fund could be lawfully invested in, the court said, at page 108:

“That municipality neither could, nor did, pledge its credit for their payment, and, as we have shown, without such pledge they cannot be ‘municipal bonds’ within the meaning of that term as used in the constitution.”

It appears from the language of the opinion that the city could not pledge its general credit to the payment of those

bonds, because the amount thereof would exceed its constitutional debt limit. This fact accounts for the language of the court in so far as it has reference to the power of the city to pledge its general credit for the payment of the bonds. Upon the principle of the holding of the court in the *Port Townsend* case, it would seem plain that the bonds here involved will not be legally issued general state bonds, unless the credit of the state is lawfully pledged to their payment. By ch. 59, Laws of 1911, as amended by ch. 50, Laws of 1913, the legislature authorized the state capitol commission to proceed with the construction of permanent capitol buildings and to obtain funds therefor by the issuance and sale of bonds against the capitol building fund to be derived from the sale of the capitol lands. Section 2 of that act as amended, among other things, provides:

“The said capitol commission may proceed at once to issue negotiable annual interest bearing bonds in an amount not exceeding four million dollars against the capitol building fund and to sell the same . . . Such bonds shall bear a rate of interest not to exceed five per cent per annum, . . . The proceeds of the bonds herein authorized to be issued shall be used: 1st, in the payment of all outstanding warrants and interest thereon against the capitol building fund; 2d, in repaying to the general fund the advancements made therefrom to the capitol building fund; 3d, for the carrying out of the other purposes mentioned in section one of this act. . . . The state of Washington hereby guarantees the payment of the principal and the interest on all bonds issued under the provisions of this act.” Laws 1913, p. 139.

Section 5 of that act, among other things, provides:

“Sec. 5. Whenever the capitol commission shall offer any bonds for sale, and there shall be in the permanent school fund, or other permanent or investment fund, sufficient uninvested funds to cover the purchase of such issue of bonds or any part thereof, the board, officer or officers, authorized to invest any such fund may invest the same in any of said bonds: *Provided, however,* . . . *And provided fur-*

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ther, that any and all bonds purchased by any of the permanent funds as in this section provided, shall, for the purposes of such investment, be deemed in all respects state general bonds and shall be guaranteed both principal and interest by the general fund of the state." Laws 1911, p. 823.

It thus becomes plainly manifest that the legislature sought to pledge the credit of the state to the payment of these bonds to the end that the permanent school fund could be lawfully invested therein, evidently having in mind the limitations upon such investment prescribed by § 16, art. 5 of the state constitution, above quoted, and the decisions of this court construing the same which we have noticed.

The problem now confronting us is, will these bonds, when issued, be such securities as the permanent school fund of the state may be lawfully invested in? This problem must, of course, find its solution in the correct answer to the question, Will these bonds, when issued and acquired by the permanent school fund as an investment, be legally "*in all respects state general bonds*," as declared by the language of § 5 above quoted? If they cannot be lawfully issued as such, that is, if the general credit of the state cannot be lawfully pledged for their payment, it must follow that they will not be such securities as the permanent school fund may be lawfully invested in.

The debt creating power of the state has its limitations as defined by art. 8 of the state constitution, reading as follows:

"Sec. 1. The state may, to meet casual deficits or failure in revenues or for expenses not provided for, contract debts, but such debts, direct and contingent, singly or in the aggregate, shall not at any time exceed four hundred thousand dollars (\$400,000), and the moneys arising from the loans creating such debts shall be applied to the purpose for which they were obtained, or to repay the debts so contracted, and to no other purpose whatever.

"Sec. 2. In addition to the above limited power to contract debts, the state may contract debts to repel invasion,

suppress insurrection, or to defend the state in war, but the money arising from the contracting of such debts shall be applied to the purpose for which it was raised, and to no other purpose whatever.

“Sec. 3. Except the debt specified in sections one and two of this article, no debts shall hereafter be contracted by or on behalf of this state, unless such debt shall be authorized by law for some single work or object to be distinctly specified therein, which law shall provide ways and means, exclusive of loans, for the payment of the interest on such debt as it falls due, and also to pay and discharge the principal of such debt within twenty years from the time of the contracting thereof. No such law shall take effect until it shall, at a general election, have been submitted to the people and have received a majority of all the votes cast for and against it at such election, and all moneys raised by authority of such law shall be applied only to the specific object therein stated, or to the payment of the debt thereby created, and such law shall be published in at least one newspaper in each county, if one be published therein, throughout the state, for three months next preceding the election at which it is submitted to the people.”

It seems plain to us that this proposed obligation to which the general credit of the state is sought to be pledged for payment, would not belong to that class of obligations which may be incurred under § 1, even if within the \$400,000 limit there prescribed; and being far beyond that limit in amount, such fact furnishes an additional obstacle to the lawful incurring of the obligation, in so far as the provisions of that section are concerned. Of course, the incurring of the obligation is not authorized by § 2, since it is not sought to be incurred to repel invasion, suppress insurrection, or to defend the state in war; and not being authorized by a vote of the people, the proposed obligation has not the semblance of support in § 3. It is worthy of note in this connection that, in so far as this particular proposed obligation of the state is concerned, the sections of the constitution above quoted are not merely a limitation upon the amount of debt which may be incurred, as in the constitutional provisions

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relating to the debts of municipal corporations, but they constitute an absolute prohibition against the creation of any debt in any sum for this purpose, except by a vote of the people. In *State ex rel. Jones v. McGraw*, 12 Wash. 541, 41 Pac. 893, referring to § 1 of art. 8 of the constitution, the court said:

“The prohibition in the constitution is that ‘such debts, . . . singly or in the aggregate, shall not at any time exceed four hundred thousand dollars,’ and constitutes an ‘impassable barrier’ to the creation of any indebtedness in excess thereof for any period of time, however brief, or for any purpose, however worthy.”

Surely the language of § 3, which is not merely a limitation upon the amount of the indebtedness which may be incurred, but is an absolute prohibition against the incurring of any debt in this manner for this purpose, is a no less “impassable barrier” to the lawful consummation of what is here attempted.

Learned counsel for the capitol commission, apparently recognizing the correctness of the conclusions indicated by what we have thus far said, argues—and this is his principal contention—that since it has been determined in the manner provided by law that the value of the capitol lands, the proceeds from the future sales of which are pledged to the payment of these bonds, exceeds the amount of the obligation to be incurred by their issuance, such lawfully ascertained value may be offset against such obligation for the purpose of showing that the state will not be required to pay any part thereof out of its general revenues. In other words, that the state is incurring this obligation in form only and not in substance, and, therefore, not in violation of the limitations prescribed by the sections of article 8 of the constitution above quoted. In support of this view our attention is called to the decisions of this court in the following cases: *State ex rel. Barton v. Hopkins*, 14 Wash. 59, 44 Pac. 134, 550; *Mullen v. Sackett*, 14 Wash. 100, 44 Pac. 136; *Kelley v.*

Pierce County, 15 Wash. 697, 46 Pac. 253; *Rands v. Clarke County*, 15 Wash. 697, 46 Pac. 1119; *Graham v. Spokane*, 19 Wash. 447, 53 Pac. 714.

Each of these cases involved the constitutional debt limit of a city or county, and the decisions rendered therein establish the rule, in harmony with that prevailing in states having a similar constitutional provision as ours as to municipal indebtedness, that the cash assets of a municipality may be deducted from its outstanding indebtedness for the purpose of determining the amount of its indebtedness within the meaning of the constitutional provision limiting such indebtedness. The decisions rendered in these cases also hold that unpaid taxes of the current year, and also unpaid delinquent taxes, constitute a part of the assets of the municipality which may be so deducted from its total outstanding debt for the purpose of determining its amount, within the meaning of the constitutional debt limit. These decisions, it is insisted, are applicable, by analogy, to the solution of the problem here presented, and support the contentions of the capitol commission.

We find ourselves wholly unable to adopt this view. None of these decisions deal with the question of deducting the value of land belonging to a municipality from the total amount of its outstanding debt to determine the amount of such debt within the meaning of the constitutional debt limit provision, and the industry of learned counsel for the capitol commission has not brought to our attention a single decision of any court carrying the rule of deducting assets to the extent of deducting the value of land owned by the municipality from outstanding indebtedness, to escape the restraining effect of the constitutional debt limit provision. We think there are no such decisions. The only authorities relied upon by counsel for the capitol commission in addition to our own decisions above noticed are *Brooke v. Philadelphia*, 162 Pa. St. 123, 29 Atl. 387, 24 L. R. A. 781; and *Bank for Savings v. Grace*, 102 N. Y. 313, 7 N. E. 162. In the *Philadelphia*

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case, it appears that the city authorities had purchased, with moneys in its sinking fund, outstanding certificates of indebtedness of the city, the sinking fund being provided for the very purpose of paying such indebtedness, but such certificates being purchased therewith before maturity and at a time when there does not appear to have been any authority for their immediate cancellation. In other words, the city merely invested its sinking fund in the very securities which it was created to retire, at a time when such securities had not fallen due. By this means the city, in effect, became its own creditor. Disposing of the contention that the constitutional debt limit of the city could not be measured by deducting from its total uncanceled debt the face value of these securities which had been so purchased with its sinking fund, the court said, at page 131:

“It is not important in determining the actual debt, that the commissioners have not authority, immediately on purchase, to cancel or destroy the city certificate; it is paid for by the money of the obligor, put into the fund for that very purpose; as an outstanding, unpaid obligation. It can as to the obligor, have no real effective existence after it is purchased and paid for with the city’s money. And although the city, in this issue, only claims to deduct from the apparent debt the amount of 6 per cent certificates in the sinking fund, every city certificate in that fund representing a part of the funded debt, and purchased by the commissioners in the redemption or payment of that debt, ceases to be longer a part of the actual debt of the city. That much of the debt the city is no longer bound to pay, because practically it is paid. We are speaking now of the actual obligation of the city as affected by these certificates in the fund, but not yet canceled.”

The New York case deals with substantially the same situation, resulting in the same holding. These holdings, it seems to us, go no further than the decisions of this court holding that cash in the treasury of the municipality and unpaid current and delinquent taxes may be deducted from the total outstanding debt to determine the amount of such

debt, within the meaning of the constitutional debt limit provision. Indeed the holdings of the Pennsylvania and New York courts seem to proceed upon the theory that such a condition as there existed had the practical effect of liquidating that portion of the public debt evidenced by the securities which had been purchased by the sinking fund created for the very purpose of paying such indebtedness, although in form the debt so evidenced continued to exist because there was no authority for formally canceling the certificates evidencing such debt.

Counsel for the capitol commission suggests that the holding of the courts that delinquent and current unpaid taxes may be regarded as assets to offset the outstanding indebtedness of a municipality or state is based upon the theory that "in legal contemplation their collection is certain," from which he argues that since the value of the capitol lands has been ascertained in the manner provided by law, such value and its ultimate realization and application to the payment of the bonds here involved is no less certain, and it should, therefore, be regarded as an asset to offset the obligation of the state to be incurred by the issuance of the bonds. We are constrained to disagree with the conclusions to which this ingenious argument seeks to lead. We do not think that the value of the lands is fixed by the appraisement with that legal certainty which the collection of unpaid current and delinquent taxes is attended with. More than that, neither does such appraisement of value fix with legal certainty the fact that there will be a market for such lands capable of producing the amount of the appraisement when offered for sale in the future.

There has been brought to our attention but little aid from the decisions of the courts touching a contention of this nature, but in so far as the decisions throw any light upon the subject, they seem to be against counsel's contentions. In *Walsh v. City Council of Augusta*, 67 Ga. 293, there was involved the constitutional debt limit of the city; and in

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measuring the city's authority to contract indebtedness in a certain sum, it was sought to be set up that the city owned property subject to levy and sale outside of that essential for its municipal purposes, amounting in value to some \$2,000,000, which amount was claimed as a reduction in making a statement of its total indebtedness. The court observed:

"Property that the city of Augusta may own outside of the taxable property of her citizens cannot be invoked by subtracting its value to lessen the rate of her indebtedness in the meaning of this constitution, because that instrument itself fixes the per centum as 'upon the assessed value of all the taxable property therein.' Her assets, or indebtedness to her, cannot be deducted from the debt she owes, so as to make that per centum less. It is the debt she has incurred and the per centum of that debt on her taxable property with which alone the constitution deals."

In *Dolan v. Lackawanna Township School Dist.*, 10 Pa. Dist. Rep. 694, the court was asked to deduct from the outstanding indebtedness the value of a lot owned by the district conceded to be worth \$1,000, which contractors agreed to accept at that sum in part payment for their construction of a new school building for the district, in order to bring the proposed contract price within the legal debt limit of the school district. Disposing of the contention that the debt limit of the city could be so measured, the court said:

"While the contractors are bound to take the lots at \$1,000, the option is left to the school board to let them go at that price. The board may sell them at a higher price, or they may use them for some other purpose and not sell them at all. The incoming board may have different views on the matter. The value of such an item as an asset is too problematical to be considered by us now."

In *Earles v. Wells*, 94 Wis. 285, 68 N. W. 964, 59 Am. St. 885, a case involving an effort on the part of a city to construct water works, incurring a debt therefor beyond its constitutional debt limit, though anticipating that such debt be paid from the revenues of such water works, the court said:

“So long as the current expenses of the municipality are kept within the limits of the moneys and assets actually in the treasury, and the current revenues collected or in process of immediate collection, the municipality may be fairly regarded as doing business on a cash basis, and not upon credit,—even though there may be for a short time some unpaid liabilities. In other words, a municipality’s capacity for doing business on such cash basis, with outstanding liabilities, is necessarily measured by the amount of cash on hand and the available assets and resources readily convertible into cash to meet the payment of such liabilities as they become due. But the moment an indebtedness is voluntarily created ‘in any manner or for any purpose,’ with no money nor assets in the treasury, nor current revenues collected or in process of collection for the payment of the same, that moment such debt must be considered in determining whether such municipality has or has not exceeded the constitutional limit of indebtedness.”

We have noticed that these bonds are to run for twenty years, with the privilege to pay or refund the same at the end of any five-year period. It is worthy of note that the legislature did not make any appropriation whatever from its general fund towards the payment of these bonds, or any portion thereof. Indeed, under the constitution, it could in no event have lawfully done so beyond two years following May, 1913; for by § 4, art. 8 of the constitution, it is provided:

“No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within two years from the first day of May next after the passage of such appropriation act.”

Therefore, it is plain that the credit of the state is pledged to the payment of these bonds at a time far beyond that which was or could be covered by any appropriation of the legislature of 1913, which authorized their issuance. We are of the opinion that, in so far as it is sought to make these bonds available as an investment for the permanent school

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fund, it is, in effect, sought to incur an indebtedness in violation of article 8 of the state constitution; and that, notwithstanding the possibility and even probability that the obligation sought to be so incurred will be eventually liquidated by funds derived from the sales of the capitol land, and thus the burden be entirely removed from the taxpayers, they must nevertheless be regarded as general state bonds for the purpose of investing the general school fund therein. They cannot be regarded as such, in our opinion, without violating both the spirit and the letter of the sections of article 8 of the state constitution above quoted.

We conclude that the relief prayed for by the state capitol commission against the state board of finance must be denied, and that the state board of finance is not required to proceed with the purchase of the bonds with funds belonging to the permanent school fund, for the reason that ch. 59 of the Laws of 1911, as amended by ch. 50 of the Laws of 1913, is unconstitutional in so far as that law assumes to declare that capitol fund bonds purchased by the permanent school fund, shall be "state general bonds"; and in so far as it pledges the general credit of the state to the payment of such bonds.

ALL CONCUR.

[No. 10688. Department Two. June 10, 1913.]

JOHN CONTA *et al.*, *Appellants*, v. JOHN CORGIAT *et al.*,
Respondents.¹

APPEAL—REVIEW—FINDINGS. A memorandum decision intended as findings which meets all the requirements will be treated as findings of fact.

VENDOR AND PURCHASER—REMEDIES OF PURCHASER—RESCISSION—FRAUD. A sale of a lot 50x105 feet will not be rescinded for falsely representing that the lot was 120 feet long, where the purchaser twice visited and inspected the lot, its boundaries were plainly marked on the ground, and there was no concealment or pointing out of false lines and no subterfuge and no fiduciary relations between the parties; since the principle of *caveat emptor* applies.

SAME—RESCISSION—ALTERNATIVE DAMAGES. Where a rescission of a sale of a lot for fraud of the vendor in misrepresenting the area is properly denied because of the application of the rule of *caveat emptor*, there can be no abatement of the purchase price as an alternative remedy by way of damages for a deficiency in the quantity of the land.

Appeals from judgments of the superior court for King county, Ronald, J., entered February 14, 1912, in actions to rescind a purchase of land and to foreclose a mortgage, after a trial on the merits to the court. Affirmed.

Vanderveer & Cummings, for appellants.

Vince H. Faben, for respondents.

ELLIS, J.—Two actions in equity, growing out of the same transaction between the same parties, and depending upon the same state of facts, are presented in this appeal. In the first, the appellants Conta and wife, as plaintiffs, sued for rescission of a purchase of real estate from the respondents Corgiat and wife, on the ground of fraud and misrepresentation as to the length of the lot. In the second, the respondent John Corgiat sued the appellants Conta and wife, seeking to foreclose a mortgage upon the real estate in question given by

¹Reported in 132 Pac. 746.

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the appellants to secure the payment of a part of the purchase price. Both actions were pending in the lower court at the same time, and, though there was no consolidation of the two suits, a stipulation was entered into between the parties in the foreclosure suit, by their respective attorneys, to the effect that the only defense claimed was that the sale in connection with which the mortgage was given was induced by false representations entitling the appellants to a rescission, and that the foreclosure action should abide the result of the action to rescind.

The suit for rescission was first tried, and the trial judge made and filed a memorandum decision which he indicated should be treated as findings of facts and conclusions of law, unless other and more formal findings and conclusions were proposed by the parties. This was apparently not done; at any rate, the memorandum decision made by the trial court stands in the record as the only findings of fact made in the rescission suit. There is considerable controversy as to whether this memorandum should be regarded as findings of fact, but a careful examination of it leads us to the view that it meets all the requirements of findings and that it must have been so intended by the court. No statement of facts has been brought to us, so that the sole question presented is whether these findings justify the conclusions reached and sustain the decree dismissing the action for rescission.

The court found, in substance, that the appellant, an Italian of ordinary intelligence, with a fair understanding of the English language, had spent many years in Alaska, and had acquired something over six thousand dollars; that he returned to the city of Seattle, where he married, and desired there to purchase a home and a business; that he was well acquainted with the respondent Corgiat, who was a man of standing and influence with the Italian population of Seattle; that the appellant had confidence in Corgiat and informed him of his plans; and on one occasion had asked his

advice as to the value of certain property; that, in 1909, the exact date is not given, Corgiat advised appellant that he could purchase a half interest in a certain saloon from one Oberto, and that he, Corgiat, would sell him a lot with the improvements thereon for a home. Corgiat offered the lot for \$9,250, telling appellant that he himself had paid \$9,500 for it, and appellant was led to believe from the conversation with Corgiat that the lot contained 50x120 feet. The next day appellant went with Oberto to look at the property, which is in what is known as the Dearborn Street regrade. Appellant, appreciating that the surface of the lot would thus be left above adjoining streets, necessitating a regrade of the lot, and being unable to figure the quantity of earth to be removed, had Oberto make some calculations upon which to base an estimate. These calculations were made upon the assumption that the lot was 120 feet in length. On the following day, the appellant offered \$8,750 for the property, which Corgiat then refused. The next day, being Sunday, appellant, with his brother, a man of means and of ordinary intelligence, visited the lot and examined it. The court states in his findings that the evidence does not show how long they were there or how careful an examination was made, but finds that there was nothing to prevent them from making the most extended or detailed examination that the appellant might require. The lines between the lot and the adjacent properties were clearly marked by an old fence, on one side, and a rough stone bulkhead, at the rear. The house stood about four feet from the bulkhead. On Monday morning, the parties again met, and Corgiat stated that he was leaving that night for California, and that if appellant wished to close the deal he would have to do so at once. Appellant then renewed his offer of \$8,750, which Corgiat accepted. Appellant wished to consult a lawyer, but Corgiat told him that this would be a useless expense, that he could rely upon him to take care of unpaid taxes. It was agreed that \$5,750 of the purchase price should be secured by a note and mort-

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gage for that amount. Corgiat had the papers prepared, and about noon took them to appellant's house and presented the note and mortgage to the appellant and his wife for signature. Appellant, before signing, called attention to the fact that the papers did not give the dimensions of the lot, whereupon Corgiat stated that the lot was 50x120 feet. The court found that the lot fronted 50 feet on South Tenth street, and 105 feet on Lane street; and that the lot would have been worth materially more had it extended 120 feet in length on Lane street. But the court stated that he made no finding that the lot with its true dimensions of 50x105 feet was worth less than the appellant had paid for it. The appellant moved into the house upon the property, and lived there until November, 1910. In February, 1910, he notified Corgiat that he had discovered the shortage, and demanded a return of the purchase price and offered to re-deed the property to the respondents, which offer was refused.

From these findings, the court concluded that the appellant had ample time and opportunity to learn the true dimensions of the lot; that he had sufficient intelligence, if the dimensions of the lot were the real, material consideration moving him to make the purchase, to have ascertained such dimensions before signing the papers; that he had no excuse for not knowing the true dimensions of the lot, except his reliance upon the word of Corgiat; and that slight care or prudence on his part would have discovered the truth. Hence the court refused to decree a rescission, but concluded that, as a matter of equity, the appellant having received but seven-eighths of the property that Corgiat represented was being conveyed, he should have credit for one-eighth of the purchase price, or \$1,093.75, with interest from the date of the mortgage, and that the mortgage should be foreclosed for the remainder only of the sum due thereon.

This memorandum decision was filed by the court on May 26, 1911. No formal decree was then entered thereon, both parties apparently being content to await the entry of decree

in the foreclosure suit for a final disposition of the suit for rescission. On July 7, 1911, the stipulation above mentioned having been called to his attention, the trial judge, deeming himself bound by the stipulation modified his conclusions in the rescission case so as to hold that, having found that the suit for rescission must be dismissed, he had no power, under the stipulation, to rebate any part of the mortgage. Accordingly, on February 10, 1912, a decree covering both actions was entered, dismissing the rescission suit with prejudice and decreeing a foreclosure of the mortgage for the full amount of the debt secured. The Contas, as plaintiffs in the rescission suit and as defendants in the foreclosure suit, have appealed from both branches of this decree.

It is first contended that, under the court's findings, a rescission should have been granted. This court has gone far in granting rescission or relief in damages in cases of purchase of real estate induced by fraud or misrepresentation, but never so far as we would have to go to decree a rescission in this case. While the parties were friends, it would be straining a wholesome principle to the breaking point to hold that there was any fiduciary or trust relation existing between them. The lines of the lot were marked upon the ground by physical objects, the streets, the sidewalks, a fence, and a bulkhead. There was no pointing out of false lines, no artifice to conceal the true dimensions, no designation of a wrong property, no subterfuge to prevent a view of the premises or an actual measurement of the lot. The appellant Conta visited the lot at least twice, once with Oberto and once with his brother. On the first occasion, the making of an estimate for regrading the lot would naturally suggest to a man of the most ordinary intelligence a measurement, or at least a pacing off of its lines, either of which would have demonstrated the deficiency complained of. On the second occasion, the court found that the appellant and his brother had every opportunity to make the

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most extended and detailed examination that might be desired. As pertinently pointed out by the trial judge, the conduct of the appellant clearly negatives the idea that he regarded the exact dimensions of the lot as an inducing consideration to the purchase. That the fact misrepresented must be a moving factor inducing the purchase, is almost universally held essential to rescission or the alternative relief in damages. We have been cited to no decision, and have seen none, which would sustain either remedy under facts such as here found by the court. The cases cited from this court, as supporting the appellant's contention, fall, according to their controlling facts, into three classes. (1) Those in which no mention is made of the vendee's opportunity to discover the facts, or where actual artifice was resorted to, to prevent an inspection, as by pointing out the wrong land or false lines. *Phinney v. Hubbard*, 2 Wash. Ter. 369, 8 Pac. 533; *Hanson v. Thompkins*, 2 Wash. 508, 27 Pac. 73; *Lawson v. Vernon*, 38 Wash. 422, 80 Pac. 559, 107 Am. St. 880. (2) Those in which the subject-matter of the transaction was so obscured by irregularity of shape or contour, or marked with such ill-defined boundaries as to be incapable of ready, definite measurement; as in *Friday v. Parkhurst*, 18 Wash. 439, 43 Pac. 362, where an originally platted alley, shown upon the plat exhibited to the purchaser, had been vacated and no such improvement of the addition had been made as would indicate the absence of the alley. Similar considerations were controlling in *Best v. Offield*, 59 Wash. 466, 110 Pac. 17, 30 L. R. A. (N. S.) 55, and *Arrowsmith v. Nelson*, 73 Wash. 658, 132 Pac. 743. (3) Those cases in which the misrepresentation or inducing artifice was not readily discoverable because the subject-matter was located at a distance and it was known that the defrauded party would make no personal investigation. *Stack v. Nolte*, 29 Wash. 188, 69 Pac. 753; *Nelson v. Title Trust Co.*, 52 Wash. 258, 100 Pac. 730;

Woody v. Benton Water Co., 54 Wash. 124, 102 Pac. 1054, 132 Am. St. 1102; *Godfrey v. Olson*, 68 Wash. 59, 122 Pac. 1014. The cases of *Stone v. Moody*, 41 Wash. 680, 84 Pac. 617, 5 L. R. A. (N. S.) 799, and *Lilienthal v. Herren*, 42 Wash. 209, 84 Pac. 829, both rest upon their peculiar facts, which are easily distinguishable from the present case. The facts found bring this case within the rule *caveat emptor*, upon which the following cases rest: *Baker v. Bicknell*, 14 Wash. 29, 44 Pac. 107; *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613; *Walsh v. Bushell*, 26 Wash. 576, 67 Pac. 216; *Samson v. Beale*, 27 Wash. 557, 68 Pac. 180; *Zilke v. Woodley*, 36 Wash. 84, 78 Pac. 299; *Van Horn v. O'Connor*, 42 Wash. 513, 85 Pac. 260.

While this court has gone as far as any court in relaxing that rule in the interest of fair dealing, it has not abrogated the rule so as to relieve the purchaser of all responsibility for a failure to observe conditions as much within his reach as that of the seller.

In the case before us, the court denied a rescission, not upon the ground of laches, changed condition of the parties, or of the subject-matter or because of other countervailing equities, but upon what we conceive to be a proper application of the rule *caveat emptor*. Damages by abatement of a part of the purchase price being only an alternative remedy, optional with the vendee, which in the absence of laches or other equitable defense must rest upon the same evidentiary facts as the relief by rescission, it follows as a corollary that where rescission is refused on the principle mentioned, there can be no relief in damages. The trial court recognizing this fact in his conclusions held that no relief could be granted in the rescission suit, but also held, as we think inconsistently, that an abatement of one-eighth of the purchase price could be made in the foreclosure suit but for the stipulation. It is manifest that the abatement if justified at all must be because of the facts found in the rescission suit. If those facts were insufficient basis for relief in that

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action, then *a fortiori* are they insufficient in the collateral action for foreclosure. We find it unnecessary to enter upon an invited construction of the stipulation, since it is manifest that, under no theory of the case, was an abatement in the foreclosure suit warranted.

Both decisions are affirmed.

CROW, C. J., MAIN, FULLERTON, and MORRIS, JJ., concur.

[No. 10746. Department Two. June 10, 1913.]

THE STATE OF WASHINGTON, *on the Relation of Thomas Cole, Respondent*, v. D. C. COATES, *Commissioner of Public Works of the City of Spokane, et al., Appellants*.¹

MUNICIPAL CORPORATIONS—OFFICERS—REMOVAL—CIVIL SERVICE REGULATIONS—NECESSITY OF CHARGES. Under a city charter providing for civil service, and that only day laborers may be removed without cause being shown, a "cross-walk foreman," which position had the attribute of permanency, cannot be removed without cause; and it is immaterial that the method of compensating for the services had been changed.

Appeal from a judgment of the superior court for Spokane county, Bell, J., entered February 24, 1912, upon findings in favor of the plaintiff, in *quo warranto*, after a trial on the merits. Affirmed.

Harris Baldwin, for appellant Rose.

FULLERTON, J.—The relator was removed, without cause being shown for such removal, from the position of "cross-walk foreman," in the city of Spokane, by the commissioner of public works of that city, and the appellant Rose was appointed to perform the same duties, although under the title of sub-street foreman. The relator brought this proceeding in *quo warranto* seeking to be restored to the position, and to recover the salary during the time of his ouster. He suc-

¹Reported in 132 Pac. 727.

ceeded in the court below, and this appeal is prosecuted from the judgment entered in his favor.

The case is here upon the findings of fact made by the trial court. The findings are as follows:

“(1) That the said Thomas Cole was, in the month of July, 1909, appointed to the position of cross-walk foreman of the city of Spokane, Washington, and continued to hold and occupy the said position of cross-walk foreman up to and including the 31st day of March, 1911, at the monthly salary of \$80 per month; that the said position so occupied by Thomas Cole is and was a subordinate position in the street department, and not the head of a department.

“(2) That the city of Spokane is a municipal corporation of the first class, organized under the laws of the state of Washington, and having a common charter, and that on the 28th day of December, 1910, by an election of the voters of the said city, did adopt a new charter, and among other offices of said city of Spokane is the position of commissioner of public works, and that D. C. Coates is now and has been since the 14th day of March, 1911, commissioner of public works of the city of Spokane, and under the provisions of said charter has supervision and control over the affairs of street and public works, including all the positions in said department.

“(3) That under the provision of article six of said charter of the city of Spokane, provision is made for a civil service commission; that all employes of the city of Spokane in office at the time of the adoption of said charter shall retain their positions unless removed for cause; that under the civil service provisions of said charter of the city of Spokane, the civil service commission, consisting of three members, constitutes the board, and that removal of any employe under the civil service provisions of said charter shall only be made by the said civil service commission after an employe has been suspended by the head of the department under which he is employed, charges preferred and an inquiry had before the said civil service commission; that said position of cross-walk foreman or sub-foreman was on April 1st, 1911, and ever since has been and is now within the civil service provisions and rules and regulations of said civil service commission.

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“(4) That on the 1st day of April, 1911, the said D. C. Coates, commissioner of public works, did attempt to dismiss and discharge the said plaintiff from the said position of cross-walk foreman and did then and there strike the name of the said Thomas Cole from the pay roll of the city of Spokane, and did refuse to allow the said Thomas Cole to perform his duties as cross-walk foreman, and continue in the employment of the city of Spokane, and that said D. C. Coates, commissioner of public works of the city of Spokane, did not suspend the said Thomas Cole, or file a statement of the suspension with the civil service commission of the city of Spokane as required by said charter, but did attempt to dismiss and discharge said Thomas Cole by said act of striking his name from the pay roll, and refusing said Thomas Cole permission, or allowing said Thomas Cole to perform the duties of his said position, and that Thomas Cole was precluded from carrying on his said employment solely by the acts of the said D. C. Coates as commissioner of public works of the city of Spokane, and the administrative head of said department of public works and streets of said city.

“(5) That on the 1st day of April, 1911, the said D. C. Coates, commissioner of public works of the city of Spokane, did name and appoint the defendant James M. Rose to said position of cross-walk foreman in place of said Thomas Cole, and that said James M. Rose on the 1st day of April, 1911, entered upon said position and place and since has continued to fill and occupy the said position, and has withheld the said position from the plaintiff Thomas Cole, and has usurped the said position and employment, and that the said appointment of James M. Rose was illegal and void and in violation of the city charter, and without right or legal power of said D. C. Coates as commissioner of public works of the city of Spokane, to appoint the said James M. Rose to said position.

“(6) That after the 1st day of April, 1911, the city of Spokane, Washington, by ordinance duly passed, changed the compensation of said position of cross-walk foreman or sub-foreman to the sum of \$3.25 per day; that the said position so occupied and held by said Thomas Cole up to and including March 31st, 1911, and occupied and held by the defendant James M. Rose from April 1st, 1911, up to and

including the time of trial of this said action, was and is the one and the same position, and which is now designated by ordinance of the city of Spokane as sub-street foreman, and was and is a subordinate position and not the head of a department, and that the duties of the said James M. Rose as sub-street foreman, and the work he performed and his employment was and is the same work and employment as performed by the said Thomas Cole before his attempted removal and discharge as hereinbefore set forth; that the court finds that the position of sub-street foreman in the street division of the department of public works of the city of Spokane is one and the same position that was formerly designated as cross-walk foreman, and that said Thomas Cole is entitled to be restored to the said employment and position of sub-street foreman of the street division of the department of public works of the city of Spokane, Washington, forthwith, and that said defendant James M. Rose be removed from the said position forthwith.

"(7) The court finds that from the 1st day of April, 1911, up to and including the 15th day of February, 1912, said defendant James M. Rose has received and drawn from the city of Spokane, Washington, in the said position as cross-walk foreman or sub-street foreman, the sum of \$812.50, and that the said plaintiff Thomas Cole is damaged in the said sum in the loss of said salary, by the illegal usurpation of the said position and employment by the said James M. Rose, and that the said plaintiff is entitled to judgment against the said defendant James M. Rose for the sum of \$812.50, and judgment for any unpaid salary due from the city of Spokane, Washington."

The provisions of the city charter applicable to the question involved are set forth in *State ex rel. Powell v. Fassett*, 69 Wash. 555, 125 Pac. 963. From an examination of these provisions, it will be observed that the only employees of the city subject to removal without cause being shown for such removal are day laborers. It will be observed, also, that prior to the change in the method of compensating the services performed by the relator (recited in the sixth finding of fact quoted), the position held by the relator was plainly not that of a day laborer. A day laborer is one whose en-

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gagement to labor is but a day long (13 Cyc. 264), while this position had the attribute of permanency. As shown by the record, it has now existed for a longer period than two years, and still continues to exist.

Did the change in the method of compensating for the services change the nature of the employment? We think not. The employment is still continuous, and this fact, rather than the manner by which it is compensated, fixes its nature.

The judgment is affirmed.

Crow, C. J., MAIN, ELLIS, and MORRIS, JJ., concur.

[No. 10747. Department One. June 10, 1913.]

JOHN ALBERT OLSON, *Appellant*, v. G. A. CARLSON *et al.*,
Respondents.¹

MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—UNSAFE METHOD OF WORK—QUESTION FOR JURY. Whether a foreman in railway construction work adopted a safe method of loading a heavy timber, weighing 800 to 1,400 pounds, on a dump car, is a question for the jury, where attempt was made to lift it up one end at a time, and it appears that four men were detailed to hold one end, seven feet above the ground on which they were standing, while other men attempted to swing around and lift up the other end, and that the timber was slippery from snow or ice upon it, and fell when the men were unable to lift the last end high enough to put it on the car.

SAME—ASSUMPTION OF RISK. In such a case, whether plaintiff assumed the risk or was guilty of contributory negligence, are questions for the jury, where he acted in pursuance of the specific directions of the foreman.

SAME—FELLOW SERVANT'S NEGLIGENCE—QUESTION FOR JURY. In such a case, whether the negligence of fellow servants, assisting the plaintiff to hold one end of the timber on the car, in running away and letting the timber fall, was the cause of the injury, is a question for the jury, where there was evidence that they were unable to hold up the end.

¹Reported in 132 Pac. 721.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered April 15, 1912, upon sustaining a challenge to the sufficiency of the evidence, dismissing an action for personal injuries sustained by a common laborer in railroad construction work. Reversed.

Robertson & Miller, for appellant.

Cannon, Ferris & Swan and *John B. White*, for respondents.

PARKER, J.—The plaintiff commenced this action seeking recovery of damages for personal injuries which he alleges resulted to him from the negligence of the defendants while in their employ as a common laborer. At the close of the evidence introduced in behalf of the plaintiff, counsel for the defendants moved for a dismissal upon the ground of the insufficiency of the evidence to sustain any verdict against them. This motion being denied by the court, evidence was introduced in behalf of the defendants, and at the close of all the evidence, counsel for the defendants again challenged the sufficiency of the evidence to sustain any verdict against them, and moved the court to withdraw the case from the jury and render judgment in their favor. The court sustained this challenge to the sufficiency of the evidence, and rendered its judgment accordingly. From this disposition of the cause, the plaintiff has appealed.

At the time appellant was injured, he was employed as a common laborer by respondents, who were then contractors engaged in railway construction work for the Chicago, Milwaukee & Puget Sound Railway Company, near Rosalia, in Whitman county. Appellant was injured by a heavy timber falling upon him while he was assisting other employees, common laborers, in an attempt to load it upon a dump car. The timber was 10x18 inches in size, and 20 feet long, and weighed between 800 and 1,400 pounds, according to the varying estimates of the witnesses. The dump car was 5½ feet high above the rails on which it stood, and the top of it

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was about 6½ to 7 feet above the ground on which the men were required to stand by the side of the track while attempting to load the timber on the car. There was a side-track parallel with, and a short distance from, the track on which the car stood. The timber lay upon the ground on the opposite side of this track, some twenty feet from the car. Snow was upon the ground at the time, and the timber had some snow and possibly some ice adhering to it, rendering it slippery. The foreman directed the men to load the timber on the car by hand. There were no skids or other appliances furnished or used in the attempt to load it. The men first lifted the timber and laid it on the ties of the side-track, lengthwise to the car and the track. Appellant testified as follows:

“Q. Well, what did you do then? A. These men came out and foreman Lunden told us, ‘Take up the timber and load it on that car.’ He says, ‘You take one end first, pick up one end and put that on first.’ And we did as he directed us to. When we got one end up he told us to swing the other end around, and some of us, about four of us, stood at that end and held against the timber so it wouldn’t slip off, while the other men lifted up the other end and was going to swing it on. . . . After we got one end up on the car, the foreman, Lunden, told us, ‘Some of you fellows step here and hold it against this end so it won’t fall off; you fellows go to the other end and swing it around.’ Q. And did they do that? A. Yes, some of the men went over to the other end. Q. Then what happened? A. They lifted it up, lifted it up so they got it about level, and then swung it around so easy, and when they got to the corner of the car, got to the other end there, the foreman told them to give it a turn, to swing that end over the corner, and when they was going to give it a turn the other end slipped off. Q. You say there were four or five men on your end of it? A. Yes sir. Q. And how many were on the other end when they swung it around? A. About six or seven. . . . Q. Now, you have already stated that the foreman ordered the other men to swing the other end up, and they did try to swing it up. Now, just tell the jury what happened,

either while they were attempting to swing the other end up, or just after they swung it up. A. When they was swinging, they carried it around until they got it about lengthwise with the car and they raised up as high as they could reach, in my opinion. Q. Could they get it up even? A. No, it was not even with the car; was not quite even; was slanting a little. And then when they got to the corner the foreman told them to cant it, to get it in over the corner. Q. What do you mean by canting; do you know? A. Turn the timber around. Q. Then what happened? A. They was going to cant it around and we couldn't hold the timber at our end, and the timber came right down on top of me."

This testimony of the appellant is, for the most part, corroborated by at least two other witnesses, who were present during the attempt to load the timber on the car, one of whom testified that when the timber slipped and fell the men "all got away except Olson," and that "they were forced to run away or else they would all have got hurt." The presence of the foreman, and his giving specific directions as to the manner of loading the timber, is a subject of conflict in the evidence, but we think there was ample evidence to warrant the jury in concluding that he was present and gave directions in substance as stated in the above quoted testimony. We find but little conflict in the evidence as to the manner in which the timber was attempted to be loaded, the cause of it falling, and the getting away from it by the men when it fell and injured Olson.

The principal act of negligence relied upon by counsel for appellant is that respondents adopted an unsafe method for the loading of the timber. They contend that the evidence was such as to call for the decision of the jury upon that question. We are constrained to agree with this contention. It seems to us that, in view of the weight of the timber, the height at which it was required to be raised to reach the top of the car, its slippery condition, the apparent difficulty of the men in controlling with their hands only the end of the timber upon the car, some seven feet from the

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ground on which they were standing, while the other end was being carried around so as to become nearly parallel with the car with a view to raising that end on the car, there is ample room for difference of opinion among reasonable minds as to this being a safe method of loading the timber upon the car, and as to it being the proximate cause of appellant's injuries. This view finds support in *Ball v. McGrath*, 43 Wash. 107, 86 Pac. 382, and *Bonnett v. Galveston, H. & S. A. R. Co.*, 89 Tex. 72, 33 S. W. 334.

Some argument is made by counsel for respondents upon the theory that appellant assumed the risk. Whatever force there may be in this argument, it seems to us it is one to be addressed to the jury under proper instructions, and it cannot be decided as a matter of law, in view of the evidence relating to specific directions given by the foreman. It certainly cannot be said as a matter of law that appellant assumed the risk, or was in any degree contributorily negligent in assisting his fellow workmen in the manner he did in view of the foreman's direction and his own lack of experience in that kind of work. *Bailey v. Mukilteo Lumber Co.*, 44 Wash. 581, 87 Pac. 819; *Withiam v. Tenino Stone Quarries*, 48 Wash. 127, 92 Pac. 900; *Anastasakas v. International Contract Co.*, 57 Wash. 453, 107 Pac. 342; *Nelson v. Ballard Lum. Co.*, 60 Wash. 690, 111 Pac. 882; *Knudsen v. Moe Brothers*, 66 Wash. 118, 119 Pac. 27.

It is contended by counsel for respondents that the evidence conclusively shows that whatever negligence resulted in appellant's injuries, other than that of his own, was the negligence of his fellow servants. This argument is rested upon the theory that the men who were assisting him to hold the upper end of the timber upon the car while the lower end was being carried around by the other men, negligently ran away and let it fall upon him. This also, we think, was a question for the jury, in the light of the evidence tending to show that the men were unable to hold that end upon the car while the other end was being carried around, and that they

got out of the way because of their inability to hold it, seeing it was about to fall. This question, we think, cannot be decided against appellant as a matter of law.

We are of the opinion that the learned trial court erred in declining to submit to the jury the question of respondents' negligence in adopting an unsafe method for loading the timber.

Some contention is made relative to the question of insufficiency of the number of men furnished by respondent for the loading of the timber. This question becomes immaterial to our disposition of the cause, in view of our conclusion upon the other question of negligence which we have noticed. We conclude that the judgment of the trial court must be reversed, and appellant granted a new trial.

It is so ordered.

CROW, C. J., CHADWICK, MOUNT, and GOSE, JJ., concur.

[No. 10960. Department One. June 10, 1913.]

ANNA WHITE, *Appellant*, v. JOHN McDOWELL, *Respondent*.¹

DIVORCE—CUSTODY AND SUPPORT OF CHILDREN—MODIFICATION OF DECREE—EVIDENCE—SUFFICIENCY—PARENT AND CHILD. A decree of divorce, which awarded the custody of a child of tender years to the mother, with provisions for support, having been modified, in 1904, upon the mother's remarriage to a prosperous farmer, so as to relieve the father from ~~payments~~ for support, should not, eight years later, be again modified to compel the father to support and educate the child, where conditions had not materially changed, he had remarried and has a child of his own, and the stepfather is able and willing to provide support as in the past; the duty of a stepfather to support his stepchildren being something more than a mere charity.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered October 31, 1912, denying an application for the modification of a decree of divorce, as to provisions for the support of a child. Affirmed.

¹Reported in 132 Pac. 734.

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Opinion Per MOUNT, J.

Frank H. Kelley and Ralph Woods, for appellant.

Bates, Peer & Peterson, for respondent.

MOUNT, J.—This proceeding was instituted in the lower court to require the defendant to provide for the support and education of his minor daughter. Upon a hearing the trial court denied the petition, and the petitioner has appealed from that order.

It appears that, in the year 1903, the petitioner, Anna White, and the defendant, John McDowell, were husband and wife. On December 17, 1903, the superior court of Pierce county granted a divorce to the petitioner, and by the decree gave the custody of the minor daughter, then between four and five years of age, to the petitioner. It was ordered that the defendant pay to the petitioner fifteen dollars per month for the support of the said child. By the same decree, the defendant was awarded the custody of an older daughter, then about twelve years of age. These two children were the only surviving children of the parties. More than six months after the decree, the petitioner married J. S. White, a prosperous farmer residing in Okanogan county. About a year after the decree, and on October 24, 1904, the defendant, John McDowell, filed a petition in the divorce case to modify the decree which ordered him to pay fifteen dollars per month for the support and maintenance of his minor daughter under the control of her mother. Upon a hearing of that application, the court modified the decree in accordance with the motion therefor.

In February, 1912, this petition was filed by the mother asking the court to require the defendant to provide for the support and education of the younger daughter. Upon the trial of the issues made by the petition and answer, the trial court concluded that there had been no material change in the condition of the parties, and for that reason refused to further modify the decree in the divorce case. It appears that, since the modification made in the year 1904, the de-

fendant has remarried and has one child by his second wife; that he is in comfortable circumstances, having a salary of \$200 per month. It also appears that the older daughter, awarded to the defendant, has since that time become of age, is married and has a home of her own.

It is argued by the appellant that it is the natural and legal duty of the father to provide for his children, and the fact that the mother of his children has remarried does not relieve him of that obligation. This is no doubt true. It is also argued that the condition of the parties has materially changed since the divorce was granted, and since the modification of the decree was made in the year 1904, and that, therefore, the defendant should be required to provide for the support of his minor daughter. There can be no doubt, under the evidence, that the children have grown older, and that conditions have changed to some extent. But we are satisfied from reading the evidence that there has been no material change in the condition of the parties such as to demand a modification of the decree. At the time the modification was made in 1904, the petitioner was married to her present husband, who was a substantial and prosperous farmer. Her child at that time was of tender years, between five and six years of age, and it no doubt required the care and attention of its mother. The older child since that time has become of age, is married, and caring for herself without the intervention of her father. The defendant has also remarried and has a child by his second wife. Further than this, there is no substantial change in the condition of the parties. There is some evidence in the record to the effect that the condition of the health of the petitioner is not good, but she testified that it was not good at the time the modification was made in 1904. Her health is practically in the same condition now as it was at that time. Her financial condition is practically the same now as it was at that time.

It is urged by the appellant that her husband, not being the father of her child, is under no obligation to support the

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child, and that she has no means of her own with which to provide for it. In *McGill v. McGill*, 67 Wash. 303, 121 Pac. 469, in considering a case where a divorced husband refused to furnish money for the support of his child as required by the decree, where the wife had remarried, we said:

“We cannot recognize charity, however willingly bestowed, as a legal substitute for the natural duty of a parent to maintain his minor child;”

which was at least an intimation that the support of a stepfather is in the nature of a charity. That, however, was said with reference to a case where the natural father was seeking to avoid an order of the court requiring him to pay for the maintenance of his own child. We are satisfied that there is a duty upon a stepfather to support the minor children of his wife by a former husband, and that this duty is something more than mere charity. The husband of petitioner is not seeking to avoid responsibility in this respect. His evidence shows that he is willing to and does provide for the child, and the evidence shows that he is able to do so. The welfare of the child is the principal matter to be considered. The trial court, after hearing all the parties and seeing their demeanor upon the witness stand, concluded that the decree in the original divorce case should not now be disturbed. We are not convinced that the court was wrong. The judgment of the court is therefore affirmed.

CROW, C. J., PARKER, CHADWICK, and GOSE, JJ., concur.

[No. 10961. Department Two. June 10, 1918.]

GEORGE ROGERS, *Respondent*, v. KANGLEY TIMBER COMPANY,
Appellant.¹

TRIAL—MISCONDUCT OF COUNSEL—STATEMENTS OUTSIDE RECORD—FAIR TRIAL. The repeated use by counsel of abusive language charging appellant with theft and fraud, not supported by anything in the record, and tending to prejudice the minds of the jury, deprives the party of a fair trial, and the error is not cured by instructing the jury to disregard the statements of counsel.

TRESPASS—CUTTING TIMBER—TREBLE DAMAGES—CASUAL OR INVOLUNTARY TRESPASS—INSTRUCTIONS. In an action for trespass for wilfully cutting timber, it is error to instruct that, if defendant removed down timber after notice to cease cutting and removing it, his acts as to such timber were voluntary and intentional; and to refuse to instruct that such removal, if done to save as much loss as possible, would not be evidence that the original trespass was wilful.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered July 1, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for trespass. Reversed.

Clayton Chapman and Leon M. Bailey (Charles O. Bates and F. S. Blattner, of counsel), for appellant.

Govnor Teats, Hugo Metzler, Leo Teats, and Ralph Teats, for respondent.

MAIN, J.—This action was brought for the purpose of recovering damages for trespass upon real property.

The plaintiff is the owner of the following described property, to wit: The south half of the southwest quarter of section 14, township 21, north, of range 1, east, Pierce county, state of Washington. The defendant is a corporation organized under the laws of the state of Washington. It appears that this corporation was organized for the purpose of taking over timber land owned by one Fuhrman for

¹Reported in 132 Pac. 731.

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Opinion Per MAIN, J.

the purpose of logging the same and thereby recouping, so far as possible, the amount of money which had been previously embezzled by Fuhrman from a bank, of which the officers were the organizers of the defendant corporation. The holdings which were taken over were in the vicinity of the plaintiff's property above described. The logging operations were begun during the year 1911, and continued over into the following year. While the operations were in progress, a logging road was constructed across the southwest corner of the plaintiff's land. From the plaintiff's land, a number of acres had been logged, when it was discovered that that particular property was not owned by the corporation. At this time, a portion of the timber which had been cut had been removed and a portion lay upon the ground ready for removal. The defendant subsequently, without the consent of the plaintiff, removed that portion that lay upon the ground. Negotiations for a settlement were entered upon immediately after the discovery of the trespass, but failed of culmination; hence the present action. The plaintiff seeks to recover damages to the land by reason of the construction of the logging road, damage to the portion of the timber remaining upon the forty uncut, damage by reason of the increased hazard from fire owing to the debris which had been left upon the land; and treble damages for the market value of the timber taken. The cause was tried to the court and a jury. During the progress of the trial, counsel for plaintiff made certain statements in the presence of the jury which the defendant claims had the effect of depriving it of a fair trial. During the opening statement it was said:

"Mr. Teats: . . . At that time, I believe, the evidence will show this man Fuhrman was conducting his wildcat logging operations over in the Rosedale district. . . ."

During the examination of the plaintiff as a witness in his own behalf, the following occurred:

"Q. What, if anything, did you do during the year 1911, or any other time, to protect that piece from fire and make

it more plain? Mr. Bates: I submit this is immaterial, because it is admitted he owns the property. Mr. Teats: They do not admit that the timber at the time was so clear that nobody but a thief would go over there and cut this man's timber off."

Again, during the cross-examination of the plaintiff, the following occurred:

"Mr. Bates: That is a government stake isn't it? A. It is a stake at the government corner. Q. The state put it there, the county government? A. The county put it there. Q. And you took it up and carried it away? Mr. Teats: We object to that. They want to show a wrong. Yes, we took it away, we have it here in court, and have got a right to, and you cannot say that because you come over and steal our timber that he did a wrong. That is the purpose of this examination."

During the cross-examination of one Fairchild, a witness on behalf of the defendant, the record shows the following:

"Mr. Teats: Q. This 80 acres there belonged to Fuhrman? A. It is not quite 80 acres; it is nearly. Q. How do you know it belonged to Fuhrman? A. Well, because they logged it off. Q. You never had any title to that? A. No, sir. Q. You do not know whether Fuhrman owned it or whether he stole it like he did the money in the bank? A. I do not know."

To all of which the defendant objected and excepted. The court said:

"There is no testimony of anything of that kind. The title to the other piece of land is not in dispute in this action, and I cannot see what good purpose it will do."

And after further colloquy, the court remarked:

"There is no evidence of any trespass on this Fuhrman land. I am inclined to sustain the objection and instruct the jury to disregard the statement of counsel about Mr. Fuhrman and his crooked record."

Fuhrman was not a party to the action. As above stated, the logging operations were conducted for the purpose of liquidating the losses sustained by the bank, apparently

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through the perfidy of Fuhrman. The plaintiff contends that the trespass was not casual or involuntary, and that the defendant did not have probable cause to believe that it had acquired title to the timber upon plaintiff's land. The defendant's position is, that the trespass was casual and involuntary, and that it had probable cause to believe that it had a right to log the land. The jury returned a verdict for the plaintiff, and made a special finding that the trespass was not casual or involuntary, and that it was committed without probable cause for belief that the timber was owned by the defendant. Motion for new trial being made and overruled, judgment was entered upon the verdict for the amount of general damages returned in the verdict, and for treble damages for the market value of the timber taken. The defendant appeals.

The appellant contends that the trial court erred in a number of particulars; but two of these will be noticed: First: Was the appellant deprived of a fair trial by reason of the opprobrious epithets used by counsel for the respondent during the progress of the trial and in the presence of the jury? and second, Did the court in its instructions to the jury err in defining the law?

I. It is claimed that, by reason of the statements of the respondent's counsel during the progress of the trial and in the presence of the jury, that the appellant was denied a fair and impartial trial. The law guarantees to every litigant the right to a fair trial. Statements not sustained by the record of such a character as to prejudice the minds of the jury against a litigant constitute prejudicial error. Whatever may have been the shortcomings of Fuhrman, the record fails to disclose any reason for characterizing the appellant and its officers and managers by the severe language made use of. The respondent contended in the superior court, and contends here, that the language used properly characterized the appellant's conduct. With this we cannot agree. Neither was the error cured by the fact that the trial court

stated that he was inclined to sustain the objection and instruct the jury to disregard the statements of counsel about Fuhrman. The poison which had been previously instilled into the minds of the jury could not be removed in that manner. In *Florence Cotton & Iron Co. v. Field*, 104 Ala. 471, 16 South. 538, it appears that in the argument of counsel to the jury it was stated, referring to the opposite party to the litigation:

“They came down here, a party of rich northern capitalists, wanting to speculate on our property, and are now trying to rob an elegant, chivalrous southern gentleman of his justly and hard earned salary.”

Objection being made, the court stated that the objection was sustained and that counsel's remark was improper. Whereupon counsel said: “Well, I withdraw the remark.” Upon appeal it was stated by the court:

“Verdicts ought not to be won by such methods, and when an attorney, in the heat of debate, goes to such extraordinary lengths, generally, the court should promptly set aside any verdict that may be rendered for his client. The repressive powers of a court, to prevent such departures from legitimate argument of a cause before a jury, should be vigorously applied. No mere statement, that it is out of order or improper, can meet the exigencies of the case. Nothing short of such action on the part of the court, and a clear satisfaction, that the prejudice naturally excited by the use of such language had been removed from the minds of the jury, ought ever to rescue a case from a new trial on motion of the party against whom rendered.”

II. As appears from the facts above stated, after the discovery of the trespass, the timber then down was removed against the consent of the respondent. The trial court was requested to instruct the jury, that if the appellant in removing the timber, or any part thereof, from the premises, did so for the purpose of saving same, or to save himself as much as possible from loss, that that would not be evidence

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that the original trespass was wilful. The specific request was in the following language:

"You are instructed that once the defendant has entered upon the premises of plaintiff and severed the trees from the stumps the trespass would be complete, and any act of the defendant thereafter, in removing such timber or a part thereof from the premises in order to save the same, or to save itself as much as possible of the loss, if you find that such was the reason for such removal, then such removal would not be evidence of malice or wilfulness on the part of the defendant in originally trespassing upon the land of the plaintiff and cutting the timber."

This request was refused, and the jury, upon the question, was instructed as follows:

"It is admitted by the superintendent and manager of the defendant company that the defendant took away that part of the timber on plaintiff's land after the time plaintiff notified them to cease cutting and removing his timber, and as to that timber you are instructed to find the acts of the defendant as voluntary and intentional."

It is now urged that the instruction given does not contain a correct statement of the law. The down timber was practically worthless to the respondent. To the appellant, with its logging facilities then at hand, it had a commercial value. The respondent's damages were not materially increased by the fact that the timber was removed. But the loss of the appellant, had it failed to remove the timber, would have been enhanced to the extent of its then market value. The instruction given, as a matter of law, determined that this act on the part of the appellant, so far as the down timber was concerned, was voluntary and intentional. This was error. The vital question in the case was not whether the appellant wilfully removed the down timber, but whether the original trespass was wilful and without probable cause. If the original trespass was not wilful, or if the appellant had probable cause for believing that it owned the property, then the fact that it subsequently removed the

down timber would not change the character of the original trespass. We think the requested instruction correctly states the law and should, therefore, have been given.

In *Batchelder v. Kelly*, 10 N. H. 436, 34 Am. Dec. 174, the court, while considering a similar question, said:

“Carrying the timber away might have had some tendency to have convinced the jury that the defendant was cognizant of and approved the original cutting; but such would not have been the necessary legal effect of the evidence, as a rule of law; and most clearly an affirmance of the cutting in this manner would not have altered the original nature of the act, so as to have rendered that wilful and malicious that was originally an unintentional and accidental trespass.”

The judgment will be reversed and the cause remanded for a new trial.

CROW, C. J., FULLERTON, ELLIS, and MORRIS, JJ., concur.

[No. 11054. Department Two. June 10, 1913.]

THE STATE OF WASHINGTON, *on the Relation of J. M. Noble,*
Appellant, v. HENRY L. BOWLBY *et al., State*
*Highway Board, Respondents.*¹

CONTRACTS—CONDITIONS—SPECIFICATIONS. Conditions in specifications attached to a contract declaring that the contract is made subject thereto, are part of the contract, where they were understood by the parties at the time of entering into the contract.

HIGHWAYS—CONSTRUCTION—CONTRACTS—UMPIRE—INTEREST. The fact that the state highway commissioner as such official was one of the parties to a contract for state road construction, does not preclude the parties from agreeing that he shall act as umpire in the matter of any dispute as to the meaning of any provision of the contract.

ARBITRATION AND AWARD—DECISION—INTEREST OF UMPIRE. An award by the state highway commissioner, named as an arbitrator in a state road contract, will not be set aside because of his official interest, where there is no showing that he acted arbitrarily or capriciously.

¹Reported in 132 Pac. 723.

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Opinion Per MORRIS, J.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered October 10, 1912, upon findings in favor of the defendants, in mandamus to secure a warrant in payment for state road construction. Affirmed.

S. P. Domer, for appellant.

The Attorney General and *R. E. Campbell, Assistant*, for respondents.

MORRIS, J.—Relator sued out this writ of mandamus, praying for a decree directing respondents to issue a voucher for a warrant in the amount claimed by him to be due upon his contract for the part construction of state road No. 2 in Stevens county. Issue being joined, the matter was submitted to the court below, resulting in a finding that the relator was entitled to receive the sum of \$1,243.31, and decree was entered accordingly, from which relator, claiming such sum is inadequate, appeals.

The dispute between relator and the state highway board is one relating to the proper classification of work and material, and what should be included in the term "surfacing," as used in the contract; appellant contending that this term includes the removal of rock from the surface of the road and the leveling to the proper grade, while respondents contend that the proper definition is to be found in the finding of the lower court that "surfacing will be done where grading is unnecessary, and shall consist of plowing and harrowing the full width of the roadbed, throwing out all roots and other perishable matter and crowning the roadbed with a road-grader." The lower court has not only found that the term "surfacing, as contemplated by this contract, is correctly defined in its finding, but in addition found that, as so interpreted, it was fully explained to and understood by relator prior to the time he entered upon the work, and that he at all times fully knew just what would be allowed him under this classification, and that, from time to time during the progress of the work, relator was informed by the resident engineer

in charge of the work what this classification would include. There is evidence to sustain these findings, and they must be sustained and accepted as the facts in the case. It is, also, we think, clear that the work now claimed by relator which should be classified as surfacing has been allowed for, and payment accepted by relator under different classifications. We find from his last estimate voucher for this work, made out subsequent to the time when the division engineer had suggested a reclassification, and some time after work on the contract had ceased, that the amount claimed as then due him was less than the sum found due by the court, and less than the amount the state highway commissioner subsequently determined as his due. Attached to the contract were the specifications providing for the manner of doing the work, and another paper labeled "general stipulations." This last paper contained the following provisions:

"It is further expressly agreed between the parties to the contract that the contract is made subject to the following conditions and stipulations: (a) In case of ambiguity of expression in the specifications or doubt as to the correct interpretation of the same, the matter shall be submitted to the highway commissioner, whose decision shall be final. . . . (1) It is mutually agreed between the parties to the contract, that, to prevent all disputes and misunderstandings between them in relation to any of the stipulations contained in these specifications, or their performance by either of said parties, that the state highway commissioner shall be an umpire to decide all matters arising or growing out of said contract between them."

Relator contends that these "general stipulations" were no part of his contract and that he is not bound by them. In this contention we think he is in error and that his own testimony shows that, at the time he entered into the contract, he understood these general stipulations formed a part of his contract relative to the matter of its performance and were as much a part of his contract as any other of its conceded provisions.

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Opinion Per MORRIS, J.

Under these stipulations the state highway commissioner, as such umpire, had ample power to determine the proper classification of the work in case of any dispute or controversy, or to interpret the proper meaning to be given to any provision of the contract. Relator contends that the highway commissioner could not act as an umpire in a matter in which he was one of the disputing parties. It is clear, we think, that the parties to this contract contemplated that somewhere there should be an authority whose determination as to these disputed matters should be final, and it is equally clear that such authority should be the state highway commissioner. The mere fact that the highway commissioner was a state official, and as such officially was one of the parties to the contract representing the state, is not, of itself, in the absence of any showing of fraud or misconduct, sufficient to render his selection as umpire nugatory. We have held that partiality, interest, or relationship on the part of an arbitrator is of itself no ground for setting aside an award, when with full knowledge of the relationship the arbitrator is agreed upon and the dispute submitted to him. *Glover v. Rochester-German Ins. Co.*, 11 Wash. 143, 39 Pac. 380; *Lidgerwood Park Water Works Co. v. Spokane*, 19 Wash. 365, 53 Pac. 352; *Skagit County v. Trowbridge*, 25 Wash. 140, 64 Pac. 901; *Zindorf Const. Co. v. Western American Co.*, 27 Wash. 31, 67 Pac. 374; and such we think is the general rule. 2 Am. & Eng. Ency. Law (2d ed.), 637. The rule of waiver is as binding under these circumstances as any other to which it might be applied. There is no showing here that the highway commissioner in making his awards to relator acted arbitrarily or capriciously, or was guilty of any misconduct that should disturb his award, and until there is some such showing, the award made by him must be accepted.

The decree of the lower court finds ample support in the facts submitted to it and the law upon which it is based, and for these reasons it is affirmed.

CROW, C. J., FULLERTON, MAIN, and ELLIS, JJ., concur.

[No. 11063. Department Two. June 10, 1913.]

THE STATE OF WASHINGTON, *on the Relation of Ralph C. Bell,*
Appellant, v. JAMES THAANUM *et al., Respondents.*¹

SCHOOLS AND SCHOOL DISTRICTS — CONSOLIDATION OF DISTRICTS — STATUTES—CONSTRUCTION. School districts forming units in separate union high school districts cannot be consolidated, under Rem. & Bal. Code, §§ 4440 to 4459, in view of the fact that such a consolidated district, being a new and distinct entity, would render uncertain the provisions of §§ 4460-4469, relating to high school districts.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered December 20, 1912, dismissing a proceeding in *quo warranto*, upon sustaining a demurrer to the information. Reversed.

R. J. Faussett and *Joseph H. Smith*, for appellant.

Stiger & Dally, for respondents.

FULLERTON, J.—This is a proceeding in the nature of *quo warranto*, brought by the prosecuting attorney of Snohomish county to inquire into the validity of the organization of consolidated school district No. 105, therein. A demurrer was interposed to the information which the trial court sustained. Thereafter an order of dismissal was entered, and this appeal is prosecuted therefrom.

The petition sets forth that the consolidated district was attempted to be formed out of the territory of school district No. 20, and school district No. 30, in Snohomish county, and is illegal and void because these districts at that time formed units in separate union high school districts; the former forming a unit in union high school district No. 103, and the latter forming a unit in union high school district No. 100. Whether school districts thus situated can be lawfully consolidated, is the sole question presented by the record.

The formation, consolidation and regulation of schools and

¹Reported in 132 Pac. 728.

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Opinion Per FULLERTON, J.

school districts are matters governed wholly by statute. In this state these statutes form a somewhat extensive code. The procedure relating to the consolidation of school districts will be found in §§ 4440 to 4459 in Rem. & Bal. Code (P. C. 413 §§ 279-317), and relative to the formation of high school districts in §§ 4460 to 4469 (P. C. 413 §§ 319-337). These are too long to be even epitomized here, but their perusal will show that it would lead to uncertainty and endless confusion if a school district incorporated as a unit in one high school district was permitted to consolidate with a school district incorporated as a unit in another and distinct union high school district. True, there is no direct prohibition against such consolidation, but in the consolidation of districts the districts consolidated lose their individuality and become a new and distinct entity, thus rendering uncertain the provisions of the act relating to the governing board of the union schools to which they belong, the means by which the high school is to be supported, what territory comprises the high school district, who are entitled to the franchise in the dissolved district, and how such franchise is to be exercised. Doubtless other provisions may be affected also, but these enumerated are enough to show that the legislature did not contemplate the consolidation of districts situated as were the districts attempting to consolidate in this instance.

The judgment is reversed, and the cause remanded with instructions to overrule the demurrer and proceed to a hearing of the information on its merits.

CROW, C. J., MAIN, ELLIS, and MORRIS, JJ., concur.

[No. 11117. Department One. June 10, 1913.]

THE STATE OF WASHINGTON, *Respondent*, v. CHARLIE HARRIS,
Appellant.¹

HOMICIDE—DEFENSES—INSANITY—BURDEN OF PROOF. In a prosecution for murder, it is proper to instruct that the burden of proving insanity as a defense is upon the defendant to establish by the preponderance of the evidence, failing which the presumption of sanity must prevail and the defendant found guilty.

CRIMINAL LAW—INSTRUCTIONS—PREPONDERANCE OF EVIDENCE. An instruction upon the preponderance of the evidence, to establish insanity, that if the jury are unable to say that they conscientiously believe the defendant was insane, the defendant has failed to establish the defense, and that the jury must find the truth, is erroneous in requiring that the defense be established beyond a reasonable doubt, or by more than the weight of the evidence.

CRIMINAL LAW—EVIDENCE OF CONFESSION—ADMISSIBILITY OF ORAL CONFESSION. Where a confession was written down in longhand in the presence of the defendant and read over to him and its truth acknowledged by parol, it is admissible in evidence the same as if signed by him.

CRIMINAL LAW—TRIAL—ARGUMENT. A confession properly admitted in evidence may be read to the jury in the closing argument of counsel.

CRIMINAL LAW—TRIAL—RIGHT TO OPEN AND CLOSE—DEFENSE OF INSANITY. Where the defense is insanity, the state has the right to open and close, since the main issue is his guilt or innocence, although the defendant has the burden of overcoming the presumption of sanity.

Appeal from a judgment of the superior court for King county, Ronald, J., entered November 2, 1912, upon a trial and conviction of murder. Reversed.

Marion A. Butler and *Robert H. Lindsay*, for appellant.

John F. Murphy and *Reah M. Whitehead*, for respondent.

MOUNT, J.—The defendant was convicted of the crime of murder in the first degree, and was sentenced to confinement

¹Reported in 132 Pac. 735.

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Opinion Per MOUNT, J.

in the penitentiary for his natural life. He has appealed from that judgment.

The cause was tried to the court and a jury. After the evidence of the state was submitted to the jury, no defense was attempted by the defendant as to the killing of James Hammond, as alleged in the information. Counsel for the defendant, at the close of the state's evidence, admitted the killing, but stated it was done without malice or premeditation; that the killing was done by the defendant when he was mentally irresponsible; that it was otherwise without justification or excuse. In other words, the sole defense to the charge was, that the defendant was insane at the time the homicide was committed. .

A number of errors are assigned which are argued under several points, which we shall notice in the order they are presented in the brief.

I. The court instructed the jury to the effect that the burden of proving insanity as a defense to a crime is upon the defendant to establish by a preponderance of the evidence; that, unless insanity is established by a fair preponderance of the evidence, the presumption of sanity must prevail and the defendant must be found guilty. Counsel for appellant concede that this instruction is in harmony with the rule announced in *State v. Clark*, 34 Wash. 485, 76 Pac. 98, 101 Am. St. 1006, but insist that this rule is not in harmony with the great weight of authority upon the subject, and for this reason, that we should reexamine the question and overrule that case. In that case we examined the question with much care, collected the leading authorities relating thereto, and concluded that the rule stated by the trial court was the proper one to be followed. We have since that time followed the rule in *State v. Craig*, 52 Wash. 66, 100 Pac. 167, and we decline to overrule that case.

In his instructions, the trial court instructed the jury as follows:

"It is admitted 'that the defendant in this case killed Hammond very much as testified to by the witnesses on behalf of the state,' but it is claimed that at the time of said killing 'he was without mental responsibility.' Hence, you must find him guilty as charged, or you must acquit him because of insanity or mental irresponsibility at the time of killing. And in case you acquit him upon such ground, then you must return special verdicts finding—

"(1) Whether you acquit him because of insanity or mental irresponsibility.

"(2) Whether the insanity or mental irresponsibility continues and exists at the present time.

"(3) Whether, if such condition of insanity or mental irresponsibility does not exist at the present time, there is such likelihood of a relapse or recurrence of the insane or mentally irresponsible condition that the defendant is not a safe person to be at large."

The court then instructed the jury upon the question of mental responsibility of the defendant at the time of the killing, and also that the law presumed the defendant sane until the contrary is shown, and that the burden of proving insanity is upon the defendant, to be established by a preponderance of the evidence. The court defined preponderance of the evidence as follows:

"Now, the words 'preponderance of evidence' do not necessarily mean that there shall be a greater number of witnesses on one side of an issue than on the other, but it means the greater weight of the credible evidence. It means that evidence which strikes your minds as having more convincing force than the evidence to which it is opposed. A sure test as to where the weight of testimony in this case lies is this:

"What do you believe the truth to be? What is, from the evidence in this case, probably the truth? Do you believe from this evidence the defendant to have been insane or mentally irresponsible at the time he fired the shot? If so, then such fact is established by a preponderance of the evidence. Or, are you unable from the evidence to determine whether that is the truth or not? If you are unable from this evidence to say that you conscientiously believe the de-

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fendant was insane, then defendant has failed to establish such defense by a preponderance of the evidence. Merely to say 'he might have been insane' or 'I don't know whether he was insane or not' is not enough. The defendant must go further and establish a greater conviction in your mind than such an uncertainty. Before you can acquit on the ground of insanity, you must be able to say from the evidence upon your oaths and your consciences, not that you are unable to determine, but that you have determined and really believe the defendant was incapable of distinguishing between right and wrong—incapable of exercising the power of will to shoot or not to shoot at the time he fired the shot. If the evidence on this point is equally balanced or is of such a character that you are unable to say and feel that you conscientiously believe this to be his condition, then that fact has not been established by a preponderance of the evidence and you cannot acquit."

The court thereupon instructed the jury with reference to expert testimony and with reference to the effect of the defendant not taking the stand in his own behalf; and the weight to be given to the evidence of certain witnesses; and then said:

"In conclusion let me remind you that you have taken an oath that you will well and truly try this case and 'true deliverance make' as between the state and the prisoner at the bar. This defendant was of sane mind or he was mentally irresponsible when he fired this shot and of this fact you must on your oaths 'true deliverance make'—your verdict must be the truth. You do not fix the punishment which must follow a conviction. The fact that punishment may follow cannot be considered by you except in so far as it may tend to make you careful. You are not responsible for what may follow, but you are responsible if your verdict does not speak the truth. You must not be moved by sympathy nor influenced by prejudice. Neither of such emotions has anything to do with your deliberations. If this defendant knew right from wrong at the time he shot, no amount of sympathy would make him innocent; if he did not so know, no amount of prejudice would make him guilty. Therefore, unmoved by any emotions of sympathy, uninfluenced by any feelings of prejudice, untrammelled by any anxiety as to pun-

ishment, you must, as honest men and women, examine all the evidence in this case and a 'true deliverance make.' "

Counsel for the appellant insist that these instructions, in so far as they attempt to define a preponderance of the evidence, are erroneous. It will be noticed that the court in defining a preponderance of the evidence, in substance says: That if the jury are unable from the evidence to determine whether that is the truth or not, if you are unable from the evidence to say that you conscientiously believe the defendant was insane, then the defendant has failed to establish such defense by a preponderance of the evidence. The defendant must go further and establish a greater conviction in your mind than such an uncertainty. If the evidence on this point is equally balanced and is of such a character that you are unable to say and feel that you conscientiously believe this to be his condition, then that fact has not been established by a preponderance of the evidence and you cannot acquit. "*Your verdict must be the truth.*" It is apparent, we think, that the substance of these instructions is to tell the jury that they must find the truth, that is, that the defendant was insane beyond a doubt, because to find that the defendant was certainly insane, or to say and feel that the jury conscientiously believed that he was insane, is to find that fact beyond a doubt. A preponderance of the evidence does not necessarily mean beyond a doubt or even beyond a reasonable doubt. The jury might well have concluded that the weight of the evidence showed that the defendant was insane, and still not have been convinced beyond a doubt that he was insane. The term preponderance of the evidence merely means the greater weight of the evidence. 14 Ency. Evidence, p. 84.

To require the defendant to establish his insanity by the greater weight of the evidence is all that is necessary. He is not required to prove that he was insane beyond a reasonable doubt or beyond a doubt, as the court in substance tells the

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jury they must find. We think these instructions upon this point were erroneous.

II. It appears that on the day following the killing the defendant made a confession to a deputy in the prosecuting attorney's office. This confession was written down in longhand in the presence of defendant and several other persons, and was read over to the defendant, who then stated that the memorandum was accurate. This memorandum was received in evidence over the objection of counsel for the defendant and it is insisted that this was erroneous. There is no merit in this contention, because, when the confession was taken down in writing and its truth acknowledged by parol, then it became the defendant's statement and might be received in evidence the same as if written or signed by him. *State v. Haworth*, 24 Utah 398, 68 Pac. 155; *Klepsch v. Donald*, 8 Wash. 162, 35 Pac. 621.

III. It is next argued that it was error to permit the prosecuting attorney to read this confession in his closing argument to the jury. The confession was properly in evidence and either side was therefore at liberty to read it to the jury. The jury were entitled to know what the confession was. *State v. Costello*, 29 Wash. 366, 69 Pac. 1099; *State v. Churchill*, 52 Wash. 210, 100 Pac. 309.

IV. Lastly, it is argued by the appellant that the court erred in permitting the prosecuting attorney to open and close the argument to the jury, for the reason that the burden of proving the insanity of the defendant was upon the defendant himself. We think, however, that the main issue was upon the guilt or innocence of the defendant. The presumption was that the defendant was sane. That presumption must be overcome by proof of insanity. The burden of proof upon the particular issue of insanity was upon the defendant, yet the principal burden was upon the state. As was said in *State v. Robbins*, 109 Iowa 650, 80 N. W. 1061:

"The theory of counsel seems to be that, because the de-

fense of insanity had to be established by a preponderance of evidence, the affirmative of the whole case was with defendant. But this is not so. The burden in this, as in every other criminal trial, is upon the state to establish the commission of the offense by defendant. The plea of insanity does not amount to a confession that the act was done by defendant, and that responsibility therefor is to be avoided by proof of mental unsoundness. Such a plea does not relieve the state from the necessity of proving every fact essential to make out the crime. The burden was upon the state in the first instance, and it had the right to open and close the case."

See, also, *Bolling v. State*, 54 Ark. 588, 16 S. W. 658; *French v. State*, 93 Wis. 325, 67 N. W. 706.

For the error in the instructions above discussed, the judgment is reversed, and the case remanded for a new trial.

CROW, C. J., PARKER, CHADWICK, and GOSE, JJ., concur.

[No. 11131. Department One. June 10, 1913.]

A. B. TAYLOR, *Respondent*, v. HOWELL-HILL MILL COMPANY,
Appellant.¹

TRESPASS—MEASURE OF DAMAGES. In an action for a trespass causing inconvenience in depriving the owner of ingress and egress, it is error to assess damages for the full rental value of the property, rather than for the damage sustained because of the inconvenience suffered.

TRESPASS—INJUNCTION—USE OF TRACK BY RAILROAD. In an action of trespass and for an injunction to prevent the dumping of shingle bolts on property preventing convenient ingress and egress, the decree will not be construed to prevent lawful use of a spur track by a public service corporation, which was not in question in the action.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered December 16, 1912, upon findings in favor of the plaintiff, in an action for damages for tres-

¹Reported in 132 Pac. 726.

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Opinion Per CHADWICK, J.

pass and for an injunction. Affirmed upon condition of remitting part of the damages.

H. G. & Dix H. Rowland, for appellant.

James Garvey, Guy E. Kelly, and Thomas MacMahon, for respondent.

CHADWICK, J.—The parties to this action are the owners of property abutting upon a street platted in the year 1888. The street was never opened for public use, and has by reason of nonuser reverted to the adjoining property owners. The appellant owns and operates a shingle mill on its abutting property, and did for a long time use the property embraced within the street lines for dumping shingle bolts, a spur track from the Tacoma & Eastern railway having been laid along the street to the shingle mill and dry kiln of the appellant. Appellant so used the property as to cut off convenient ingress and egress from respondent's property. This action is grounded in trespass to recover damages, and for an injunction. The case was tried before the court without a jury. A judgment was rendered for the sum of \$125. The right to recover is admitted, and an amount believed by respondent to be sufficient to cover all the damages sustained was tendered before the trial.

We have read the testimony with some care, and we are convinced that the judgment of the court can be sustained only upon the theory that appellant's trespass was such as to operate as a total deprivation of the use of respondent's property. In fact, the case seems to have been tried upon that theory. About all the testimony that was offered goes to the full rental value of respondent's property, rather than to any loss or damage that he might have sustained because of the inconvenience suffered. No purpose would be served by detailing the testimony of the several witnesses. We are convinced that the amount of damages allowed is not sustained by the evidence, and that no greater sum than \$60 should be allowed. If, therefore, respondent is willing to

accept this amount as full compensation, and within 30 days after the remittitur goes down files a waiver of the difference, the judgment will be affirmed; otherwise the court will retry the case.

Appellant contends that the decree of the court is broader than the complaint and the issues, and that it operates to deprive it of the privilege of going upon the spur track; that, in the conduct of its business, it is necessary that it shunt cars over and across a part of the property owned by the respondent. It is true that the decree, when considered alone, might be so construed; but, in the light of the whole case, we are not inclined to give it that meaning. The track is on the ground. It is the property of a public service corporation; its right to maintain it is not before the court, and if it is operated by the company for public use, it and those whom it serves would have a right to use the track without any interference on the part of respondent.

The case will be remanded with directions to dispose of it as hereinbefore indicated.

CROW, C. J., MOUNT, GOSE, and PARKER, JJ., concur.

[No. 11247. Department One. June 10, 1913.]

J. E. BIRD, *Trustee, Respondent*, v. CALLIE L. STEELE *et al.*,
Appellants.¹

HUSBAND AND WIFE—COMMUNITY DEBTS—INDEMNITY—NATURE OF WIFE'S OBLIGATION. Where a mortgage was given by a husband and wife upon community property as security for the performance of a building contract entered into by the husband and his copartner, the debt was *prima facie* a community debt, and the obligation assumed by the wife is direct and not collateral.

CONTRACTS — EVIDENCE OF DAMAGE — CERTIFICATE OF ARBITRATOR. Where a building contract provided that if the building was completed by the owner, the affidavit of the auditor as to the cost thereof

¹Reported in 132 Pac. 724.

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Opinion Per CHADWICK, J.

shall be taken as final between the parties, the affidavit is admissible to prove the amount of the owner's damages.

MORTGAGES—INDEMNITY MORTGAGES—FORECLOSURE—PARTIES—NECESSARY PARTIES. The foreclosure of an indemnity mortgage given by one of two partners, who was liable for the whole debt, will not be defeated for lack of parties after the debt was proven, the mortgage admitted, and no demand made that the partner be brought in as an additional party.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered March 5, 1913, upon findings in favor of the plaintiff, in an action to foreclose a mortgage. Affirmed.

H. F. Norris and T. W. Hammond, for appellants.

Fitch, Jacobs & Arntson, for respondent.

CHADWICK, J.—On May 17, 1910, Roberge, Steele & Roberge entered into a contract for lathing a building, at Vancouver, B. C. For some reason, not now material, one member of the firm retired, and it was agreed that the two remaining members should complete the contract, receiving therefor an additional sum of \$1,000, or \$11,700 for the work; that in all other respects the contract should stand as before; and that security should be given to respondent for performance of the work for the benefit of Raftery & Company. Thereafter defendants Callie L. Steele and Mary E. Steele executed a mortgage upon certain property in the city of Tacoma. The mortgage was conditioned as follows:

“Whereas, the said Callie L. Steele, William Roberge and Al Roberge have . . . entered into a written agreement as sub-contractors with Raftery & Co., wherein said sub-contractors . . . are to do the lathing . . . according to the plans and specifications annexed. Now, therefore, it is agreed . . . that this instrument shall be . . . security . . . that the said William Roberge and Callie L. Steele will forthwith proceed to the due completion of said contract . . . It is also agreed that this document shall be taken as security mentioned in said agreement of the 21st day of March, 1911, . . . for all moneys that said Raftery & Co.

shall be called upon to pay over and above the sum of \$11,700 . . . to discharge any lien, charges, encumbrances or to pay any debts of the said Roberge & Steele in respect thereof."

Roberge and Steele did not perform their contract, and Raftery & Company had to pay \$1,081.81 in addition to the contract price to discharge incumbrances and pay debts contracted by Roberge and Steele. The plaintiff, who is trustee for Raftery & Company, began this action to foreclose the mortgage. From a decree in favor of plaintiff, the defendants have appealed.

It is first contended that Mrs. Steele was in no way bound to sign the mortgage which covered the home of the defendants Steele, and which would otherwise have been exempt; that she signed as a surety, and being now released because of certain alleged omissions on the part of the principal subcontractors, the mortgage has become void for the want of an obligation to sustain it. If Mrs. Steele signed the mortgage as a principal and not as a surety, it will be unnecessary to comment upon the evidence and the cases relied on to show a release, although in passing we will say that we have examined both the facts and the law, and are of the opinion that the defense of release cannot, in any event, be sustained.

Roberge and Steele were subcontractors, and engaged to do certain work for a stipulated price. They failed to meet the terms of their contract, and the firm is chargeable with the amount that Raftery paid for them. The primary test in this, as it has been in all of the later decisions of this court, is to ascertain the character of the debt. If the debt is a separate debt of the husband, the community would not be bound. If it is a debt incurred in the prosecution of a business or an enterprise out of which the community would have reaped a benefit, it is a community debt, and the husband and wife are principals in so far as their community property is concerned. Measured by this standard, we have no doubt that the obligation assumed by Mrs. Steele was direct

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and not collateral; that she executed the contract as a principal and not as a surety. This court has held in a long line of cases, indeed, as is said in *Floding v. Denholm*, 40 Wash. 463, 82 Pac. 738, that a debt contracted by the husband in the prosecution of the community business renders the community property liable for the debt, is no longer an open question in this state. This principle has been applied to simple contract debts. *Oregon Imp. Co. v. Sagmeister*, 4 Wash. 710, 30 Pac. 1058, 19 L. R. A. 233; *Horton v. Donohoe-Kelly Banking Co.*, 15 Wash. 399, 46 Pac. 409, 47 Pac. 435; *McKee v. Whitworth*, 15 Wash. 536, 46 Pac. 1045; *Philips & Co. v. Langlow*, 55 Wash. 385, 104 Pac. 610. To an accommodation indorser: *Shuey v. Holmes*, 22 Wash. 193, 60 Pac. 402. To one liable for a superadded liability as a subscriber to the stock of a corporation: *Shuey v. Adair*, 24 Wash. 378, 64 Pac. 536. To obligations incurred as a surety for a corporation in which the husband is a stockholder and the stock belonged to the community: *Allen v. Chambers*, 18 Wash. 341, 51 Pac. 478; *Allen v. Chambers*, 22 Wash. 304, 60 Pac. 1128. In an action for fraud and deceit: *McGregor v. Johnson*, 58 Wash. 78, 107 Pac. 1049, 27 L. R. A. (N. S.) 1022. And finally it was held that the community is liable for a tort committed by the husband when engaged in a business conducted for the benefit of the community. *Milne v. Kane*, 64 Wash. 254, 116 Pac. 659, Ann. Cas. 1913 A. 318, 36 L. R. A. (N. S.) 88; *Woste v. Rugge*, 68 Wash. 90, 122 Pac. 988.

Since the decision of this court in *Oregon Imp. Co. v. Sagmeister*, 4 Wash. 710, 30 Pac. 1058, 19 L. R. A. 233, the holding that any business that the husband is engaged in is *prima facie* the business of the community and prosecuted or carried on for its benefit, has not been questioned or denied, and we do not find anything in this record that would overcome this presumption. Nevertheless many cases are cited to sustain the contention that the test of a wife's liability is "whether she received in person or in benefit to her separate

estate the consideration upon which the contract depends"; and that "to the extent the consideration was not received by her in person or in benefit to her separate estate she is a surety." It was unnecessary to go beyond the decisions of this court to sustain this principle.

It has been said in many cases that the separate property of the wife is not liable for a community debt, nor can a personal judgment be rendered against her. *Philips & Co. v. Langlow*, 55 Wash. 385, 104 Pac. 610; *Anderson v. Burgoyne*, 60 Wash. 511, 111 Pac. 777; *White v. Ratliff*, 61 Wash. 383, 112 Pac. 502. That question is not before us. We have here a community debt and a mortgage upon community property. We assume that it will need no citation of authority to sustain the proposition that the wife may voluntarily pledge community property or her separate property to secure such a debt, and that when so pledged a judgment may be rendered against her foreclosing her right, title, and interest in the property so pledged.

Finally, it is contended that there is no competent evidence to prove the debt. The defendants Steele agree in the mortgage that the affidavit of the auditor "shall be taken as final between the parties hereto." The same contention was made in the case of *Lazelle v. Empire State Surety Co.*, 58 Wash. 589, 109 Pac. 195. It was there said:

"As to the next assignment, the contract provided that, in case the owner should be compelled to take charge of the building and finish the contract, the cost should be audited and certified by the architects, and such audit and certificate should be conclusive upon the parties. Such stipulations are usual in contracts of this character, and the courts recognize the same binding force of the agreement made by the parties in this respect as in any other. Having stipulated that such certificate should be conclusive, it cannot now be said it was inadmissible or incompetent to prove the damage to the owner. *Eldridge v. Fuhr*, 59 Mo. App. 44; *Norcross v. Wyman*, 187 Mass. 25, 72 N. E. 347; *Carlton v. Scoville*, 144 N. Y. 691, 39 N. E. 394."

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Syllabus.

This is met by the suggestion that the debt, being that of the firm of Roberge & Steele, the evidence must be competent as against both parties. Cases are cited holding that, in an action against a partnership all of the partners must be made parties, and that a partner cannot submit partnership matters to arbitration without special authority so to do. It will be unnecessary to comment upon these cases, for the judgment in this case does not rest upon the affidavit of the auditor alone. He was called and sworn as a witness and testified as to the amount due, and further that Roberge was present when the account was audited. The defendants Steele are liable for the whole debt, and a foreclosure of the security will not be defeated for the lack of parties, after the debt has been proven, the mortgage admitted, and no demand that the partner be brought in as an additional party has been made.

Affirmed.

CROW, C. J., MOUNT, GOSE, and PARKER, JJ., concur.

[No. 11244. Department Two. June 10, 1913.]

ANDREW J. QUIGLEY, *Appellant*, v. BYRON PHELPS,
Respondent.¹

ELECTIONS—CONTEST—NATURE AND FORM. A proceeding to set aside a certificate of election issued by the canvassing board declaring the defendant elected to a prospective official term, is an election contest and controlled entirely by statute, Rem. & Bal. Code, §§ 4941-4957.

SAME—COMPLAINT—GROUNDS. A complaint in an election contest alleging that the officers in each of the precincts wrongfully, intentionally and fraudulently counted for the defendant ballots actually cast for the plaintiff, sufficient to change the result, sufficiently charges "malconduct" on the part of such officers, within the meaning of Rem. & Bal. Code, § 4941, specifying the grounds for contest.

¹Reported in 132 Pac. 738.

SAME—CONTEST—RECOUNT—PLEADINGS — BONA FIDES. A general charge of malconduct in that the election officers in each of 391 precincts of a county fraudulently counted ballots for the defendant which were actually cast for the plaintiff is so lacking in the essential element of good faith as to warrant the court in refusing to order a recount of the ballots until preliminary evidence to impeach the returns be adduced.

SAME—RECOUNT—BALLOTS—PRELIMINARY EVIDENCE TO IMPEACH. While the ballots may be conceded to be the best evidence of the result of an election, in the absence of a statute requiring a recount on a contest, it is not an abuse of discretion to refuse to order a recount of the ballots in a populous county, unless preliminary evidence is first adduced to impeach the returns, where the charges of malconduct were general and vague, and the work of recounting would require much time and expense.

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 12, 1912, dismissing an election contest for want of preliminary evidence to impeach the returns. Affirmed.

Geo. H. Rummens, for appellant.

W. H. White, Edgar C. Snyder, and Kit Gould, for respondent.

ELLIS, J.—This is an appeal from a judgment dismissing a proceeding to contest an election. It involves the same proceeding a review of which by certiorari was sought and denied in *State ex rel. Quigley v. Superior Court*, 71 Wash. 503, 129 Pac. 83.

The contestant, claiming to have been elected county auditor of King county at the last general election, instituted proceedings in the superior court of King county against Byron Phelps as defendant, to set aside the certificate of election issued by the canvassing board declaring the defendant elected to that office. As pointed out by the trial court, the proceeding is not in *quo warranto*, either as at common law or as given by our analogous statutory action. It is not an action to oust an intruder or a usurper, but to try out the right to a prospective official term. It is not

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founded upon, nor aided by, any common law right. The right to a contest such as here presented rests solely upon, and is limited by, the provisions of the statute relative thereto. Rem. & Bal. Code, §§ 4941-4957 (P. C. 167 §§ 109-133). By this statute, § 4941, a contest as to a county office may be instituted, not only by a defeated candidate, but by any qualified elector of the county; but only for the following enumerated causes:

“(1) For misconduct on the part of the board of judges or any member thereof;

“(2) When the person whose right to office is contested was not, at the time of election, eligible to such office;

“(3) When the person whose right is contested shall have been, previous to such election, convicted of an infamous crime, by any court of competent jurisdiction, such conviction not having been reversed, nor such person relieved from the legal infamy of such conviction;

“(4) When the person whose right is contested has given to any elector or inspector, judge or clerk of the election, any bribe or reward, or shall have offered any such bribe or reward for the purpose of procuring his election.

“(5) On account of illegal votes.”

The complaint or statement of contest in the case before us alleges the ground of contest as follows:

“That in each and every of said precincts of said county the said board of judges of elections thereof, wrongfully, fraudulently, intentionally and unlawfully counted and recorded in the official tally sheet of said several precincts, for the said defendant, votes which were given and cast for this plaintiff, and in each and every of said precincts the said board of judges of election thereof wrongfully, fraudulently, wilfully and unlawfully failed and neglected and omitted to count for and to enter upon the tally sheets votes which were given and cast for the plaintiff.”

It is also alleged that, in truth and in fact, there were more votes cast for the plaintiff than for any other person for the office in question, and that he was duly elected to the office. It is admitted that the returns show that the defend-

ant received in the neighborhood of 600 more votes than the plaintiff. It is manifest that, if any cause of action was stated, it rested upon the first of the above enumerated statutory grounds, namely, "malconduct on the part of the board of judges or any member thereof." The statute (Rem. & Bal. Code, § 4948; P. C. 167 § 116), provides that the statement of cause shall not be rejected for want of form, "if the particular cause or causes of contest shall be alleged with such certainty as will sufficiently advise the defendant of the particular proceedings or cause for which such election is contested." The statute further provides that the rules of law and evidence as applied to ordinary actions shall govern the court in hearing the contest, in so far as such rules are applicable. Rem. & Bal. Code, § 4952 (P. C. 167 § 120). In view of these provisions, and the liberal rule applicable to pleadings in ordinary actions, we think the statement of contest sufficient. It is admitted that there are 391 election precincts in King county, and it is alleged that in every one of these the election officers—and there are three in each precinct—wrongfully, intentionally and fraudulently counted for the defendant ballots actually cast for the plaintiff. Disregarding, as we must, the general allegation of fraud, as mere epithet or at most a conclusion (7 Ency. Plead. & Prac., pp. 382, 383), there still remains the charge that sufficient votes actually cast for the plaintiff were counted for the defendant to have changed the result. While the word is not used in the statement, this conduct would amount to "malconduct" regardless of the motive by which it was actuated. *Hadley v. Gutridge*, 58 Ind. 302; *Minor v. Kidder*, 43 Cal. 229.

Upon the trial, the plaintiff demanded that the ballot boxes for each of the precincts of the county be admitted in evidence and the ballots recounted. The trial judge, in passing upon the motion to dismiss the contest on the statement or complaint, stated his views on this question so clearly that we take the liberty of a quotation. He said:

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"Now there seems to be every consideration of public policy which should influence the court to be cautious and slow in ordering the opening of the ballot boxes. Every presumption is in favor of the faithful performance of official duty. Under our system men presumably qualified are appointed as election judges and clerks, and when they have returned the vote cast under their supervision with a certificate of the number of votes cast for the respective candidates, the law throws around that return the shield of the legal presumption that these public officials have performed their duty. Likewise when the canvassing board in auditing these returns have issued a certificate of election, that certificate stands as speaking the fact in a court of law until the verity of it has been overcome by clear and satisfactory proof. It cannot be that it was contemplated that any voter of this county may through idle whim or audacity of purpose institute an election contest with regard to any county office without some proof to present in advance of the opening of the ballot boxes that there is a just cause presented to the court. It is hard to conceive that the legislature would put it in the power of such an irresponsible and unscrupulous voter to subject the community to the disturbance of an election contest and the taxpayers to the cost of such a proceeding without a reasonable case presented to the court to justify the opening of the ballot boxes. In a populous community such as King county, where a hundred thousand or more ballots are cast, such an election contest means the consumption of the time of the court for a month or more perhaps, at a heavy cost to the taxpayers, at the cost of the sacrifice of public peace and tranquility, at the cost of embarrassment to the official declared to have been elected in the discharge of his duties, and the court should adopt, it seems to me, such construction of the statutes as would require a contestant, before these ballot boxes are opened and ordered to be counted, to submit some proof to satisfy the court in a reasonable way that there is a just ground to believe that the election officials have failed to perform their duty."

Again, when the ballot boxes were actually offered, the trial judge said:

"Unless the plaintiff is prepared to submit to the court in advance of the opening of the ballot boxes some proof sup-

porting the charge of malconduct on the part of the election officials, he should not charge such malconduct in his complaint. There are 391 precincts in this county, with three election officers in each precinct, and the charge in the complaint is that every one of these men and women was guilty of official misconduct in receiving the votes cast at the polls and counting votes for the defendant that were cast for the plaintiff intentionally. It seems to me that when such a charge is brought against every official connected with the election at the polls, there should be some proof at least, against some of them. But even if there should be proof of malconduct in one precinct on the part of one or more of the election officials, it would not be proof of malconduct on the part of the officials in another precinct; and logically, the court would be obliged to hold that before the ballot boxes of any precinct could be opened proof of malconduct should be submitted to the court as a condition precedent to the opening of the boxes. If I understand the statement of counsel, he declined to offer any proof at all in support of the charge of fraud and wrongful and intentional misconduct. Unless the court will permit the ballot boxes to be opened, if that is the proposition of counsel, to be consistent with my ruling, I must dismiss this proceeding."

The plaintiff has appealed, and these rulings present the real question for our consideration.

The appellant insists that the ballots themselves are the primary and best evidence of the number of votes received by any candidate, and this is undoubtedly true. 15 Cyc. 425; *People ex rel. Budd v. Holden*, 28 Cal. 124; *Coglan v. Beard*, 65 Cal. 58, 2 Pac. 737; *Id.*, 67 Cal. 303, 7 Pac. 738; *Tebbe v. Smith*, 108 Cal. 101, 41 Pac. 454, 49 Am. St. 68, 29 L. R. A. 673; *People ex rel. Keeler v. Robertson*, 27 Mich. 116; *Edwards v. Logan*, 114 Ky. 312, 70 S. W. 852, 75 S. W. 257; *Lucas v. Avis*, 28 Ky. Law 184, 89 S. W. 1; *Kingery v. Berry*, 94 Ill. 515; *Leonard v. Woolford*, 91 Md. 626, 46 Atl. 1025; *Garms v. People*, 108 Ill. App. 631; *Howser v. Pepper*, 8 N. D. 484, 79 N. W. 1018; *Caldwell v. McElvain*, 184 Ill. 552, 56 N. E. 1012.

He also contends that, when it is shown, as he offered to

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show, that the ballot boxes have been kept intact and the ballots inviolate, they should be received in evidence without any other evidence, citing the following cases: *People ex rel. Budd v. Holden*, *Coglan v. Beard*, *Tebbe v. Smith*, *Kingery v. Berry*, *Edwards v. Logan*, and *Leonard v. Woolford*, *supra*; *Langley v. Head*, 142 Cal. 368, 75 Pac. 1088; *Abbott v. Hartley*, 143 Cal. 484, 77 Pac. 410; *Catron v. Craw*, 164 Ill. 20, 46 N. E. 3; *Reynolds v. State ex rel. Titus*, 61 Ind. 392; *Hudson v. Solomon*, 19 Kan. 177; *Gantt v. Brown*, 238 Mo. 560, 142 S. W. 422; *People v. McClellan*, 191 N. Y. 341, 84 N. E. 68.

In some of these decisions it is noted that the statutes involved expressly required the production, opening, and inspection of the ballots on demand in any contest, and the wording of the statute seems to have been regarded as controlling. *Catron v. Craw* and *Kingery v. Berry*, *supra*. In most of these cases the specific question here presented was not raised so far as the opinions show. They merely hold that, as between the canvass of ballots made by the election officers and the ballots themselves, the ballots, if they have been kept inviolate, are the best evidence. The real question here presented is this: Must the court, on mere suspicion and demand of any elector, and without any proof *aliunde* the ballot box tending to impeach the regularity or integrity of the official count and canvass, order a recount of the ballots? In only two of the decisions cited by appellant was this question directly passed upon.

The Missouri case, *Gantt v. Brown*, *supra*, overruled prior decisions of that court, *State ex rel. Funkhouser v. Spencer*, 164 Mo. 23, 63 S. W. 1112, and *Montgomery v. Dormer*, 181 Mo. 5, 79 S. W. 913, in which it had been held that the court trying the contest had no authority to order the clerk to open the ballots and compare them by number with the voting lists in order to determine how the individual electors had voted, because that would destroy the effect of a constitutional provision for a secret ballot. The constitution of Missouri,

art. 8, § 3, providing for the secret ballot, contains, however, a proviso that in cases of contest the ballots may be counted and compared with the voting lists, "under such safeguards and regulations as may be prescribed by law"; and the Revised Statutes of Missouri, 1909, § 5939, read as follows:

"Either house of the general assembly, or both houses in joint session, or any court before which any contested election may be pending, or the clerk of any such court in vacation, may issue a writ to the clerk of the county court of the county in which the contested election was held, commanding him to open, count, compare with the list of voters and examine the ballots in his office, which were cast at the election in contest, and to certify the result of such count, comparison and examination, so far as the same relates to the office in contest, to the body or court from which the writ is issued."

Both the proviso in the constitution and the statute are at least capable of the construction that the ballots in any case of contest shall be immediately resorted to. They practically make the ballots themselves the only evidence in any case, without antecedent evidence of malconduct on the part of the election officials or anything impeaching their return. Under these provisions, it is difficult to understand how the Missouri court ever held otherwise.

The New York case, *People v. McClellan*, *supra*, holds with the appellant's contention here, under a statute similar to ours, but we do not feel warranted in following the broad rule there laid down. Such a rule would, as it seems to us, render the remedy by contest so easy of abuse as to invite a season of turmoil consuming weeks of the time of our courts after every election, to the exclusion of ordinary litigation and at great public expense. An election contest is not an ordinary adversary proceeding. The public is concerned, and it is the public interest to which the courts will look in such a case rather than the interest of the particular contestants. *State ex rel. McCallum v. Superior Court*, 72 Wash. 144, 129 Pac. 900; *Minor v. Kidder*, *supra*. For this

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reason a contestant will not be permitted to take judgment by default. *Keller v. Chapman*, 84 Colo. 635. For the same reason it must follow that, in determining whether the ballot boxes shall be opened and the votes recounted on mere suspicion and on mere demand—which is the effect of the complaint before us—and without any evidence impeaching the conduct of the election officers in making the original count and canvass, the courts should view the matter in all of its bearings as affecting the public interest. If the public interest would suffer from such a course, if the mischiefs resulting therefrom would be great and widespread, as seems to us inevitable, and if it does not appear that such a course is necessary to the reasonable preservation of the purity of the ballot, then the courts are not warranted in adopting that course, in the absence of a statute so directing. It is certainly not asking too much of a person who, by a sweeping wholesale charge of deliberate misconduct on the part of every election officer of his county, seeks to consume weeks of the time of the court by a recount of all the ballots at the public expense, to require him to show in advance some slight evidence of fraud or malconduct of such officers, reasonably calculated to overcome the universal *prima facie* presumption of the regularity and correctness of official action. That such a presumption exists in this as in other cases of official action is evidenced by the fact that the certificate of election is based upon that action. It will not do to say that the contestant if unsuccessful pays the costs. The taxable costs of such a proceeding are insignificant as compared with the actual expense to the public, direct and indirect. While every good citizen must concur in the sentiment that no price is too great to be paid for a pure ballot, we can hardly conceive that it is necessary to the purity of the ballot that the court, upon a mere assertion of an impalpable suspicion, may be used as a dragnet with which to fish for evidence without any antecedent showing of the slightest circumstance tending to impeach the official count.

As said in the supreme court of Minnesota in *O'Gorman v. Richter*, 81 Minn. 25, 16 N. W. 416:

"It may admit of doubt whether a court is bound to open the ballot boxes and make a recount, unless there be some evidence furnishing ground for supposing that a miscount might have been made by the judges. If a party can demand a count by the court without any such showing, it could often be resorted to as a mere fishing expedition."

It is true, as said by the Missouri court in *Gantt v. Brown*, *supra*, chiefly relied upon by the appellant:

"When *bona fide* charges of fraud are made, it should be the policy of the law to unlock all competent evidence to either prove or disprove the charges."

While heartily subscribing to the wholesome rule so announced, we still think that the charge of fraud or malconduct must be a *bona fide* charge, and that charge which is founded in such vague suspicion that no evidence can be produced as to the conduct of the election officials, *aliunde* the ballot boxes, tending to show any measure of irregularity or malconduct, does not seem to possess what can be said in law to constitute the essential element of good faith. It smacks rather of recklessness. No *bona fide* issue is presented between the official canvass and the ballots themselves until some evidence tending to show official misconduct has been adduced. Nor will it do to say that the purity of the ballot is the basis of our institutions, and to fail to protect the one is to jeopardize the other. That is a truism, but it does not warrant the court in disregarding at the threshold the presumption of rectitude which the law has universally accorded to official action, and in giving no weight to the official count in the absence of anything tending to impeach it. The law has entrusted to the duly appointed election officers the duty of counting the ballots. There is a legal presumption that they have done so honestly and carefully. Their returns are entitled to the presumption of regularity. For the court to recount the ballots without any evidence of

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wrongdoing on their part would be to disregard this presumption. It would be an assumption of a lack of integrity or competency on the part of every one of the 1,173 election officers of King county, without any antecedent proof of malconduct of any of them. If this is necessary to the preservation of the purity of the ballot in King county, then it is necessary in every other county in the state. The whole judiciary of the state may, and logically should, be called upon to recount the ballots as to every county office in every county on a mere assertion of suspicion by any elector that mistakes may have been made, and weeks of time so consumed without any tangible foundation for a belief that the result would be changed in any instance.

But even assuming that the trial court may in its discretion disregard the official count and proceed with a recount upon mere demand, can we say that it is an abuse of discretion to refuse to make the recount without some evidence of malconduct in the official count? We think not. As said by the supreme court of Colorado in a similar case:

"The order of proof is always discretionary with the trial court, and will not be interfered with by an appellate court except where there is an abuse of that discretion. The reasonable requirement of the trial court that some evidence should first be introduced as to these charges of fraud before going to the expense of bringing in, from the different precincts of the county, the election judges with their keys to open the ballot boxes, was not only within the legal discretion of the trial court, but commends itself to our judgment as a wise exercise of that discretion." *Kindel v. Le Bert*, 23 Colo. 385, 48 Pac. 641, 58 Am. St. 234.

The above decision in no manner runs counter to the earlier case cited by the appellant from the same court, *Clanton v. Ryan*, 14 Colo. 419, 24 Pac. 258. In that case nearly one hundred witnesses had been examined, and their evidence tended to show "many gross errors, mistakes, and frauds in the count and return of the votes, and other misconduct of

some of the election officers, as alleged in said statement." On this state of facts the court said:

"Under the causes of contest set forth in the sworn statement of the contestor, a recount of the ballots in the precinct where error, mistake, fraud, malconduct or corruption was charged should have been ordered as a matter of course upon request of the complaining party. A mere recount does not involve any exposure of the secrecy of the ballot. *Upon the production of evidence tending to show error, mistake, fraud, malconduct or corruption on the part of the election board, or any of its members, as charged, in the matter of receiving, numbering, depositing, or canvassing the ballots, or other illegal or irregular conduct in respect thereto, an inspection and comparison of the ballots with the poll-lists should also have been allowed, in connection with the oral evidence in reference thereto.* The secrecy of the ballot is not so important as its purity; and when, in a proper proceeding, there is evidence tending to show that the ballots of electors have been changed, tampered with or destroyed, either by mistake or by the fraudulent conduct of any member or members of the election board of any precinct, or any other person or persons, it is the right of the public, and of the electors themselves, as well as the candidates, to have such matters thoroughly investigated; and courts of justice, under such circumstances, should be swift and fearless to assist in all lawful and proper ways to ascertain the truth in respect to such charges, and to rectify so far as possible any and all wrongs, whether of mistake, negligence, or crime, which may be proved to have been committed against the elective franchise."

It is manifest that the first sentence of this quotation, which was alone quoted by the appellant, was uttered in view of the proof of fraud and mistakes which had already been made, and that it must be construed in connection with what follows, which we have italicized. So taken, the decision distinctly outlines and clearly supports the views which we have expressed. It exemplifies a sane application of a sound rule.

In the case before us, the only evidence offered as to any

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irregularity was that the footings made by the election officers on the tally sheets were in many instances wrong; but it is admitted that these errors were all corrected by the canvassing board. They were mere mistakes in addition and did not materially change the result. This was no evidence of fraud or malconduct, nor even of mistake in the actual tally. The sheets themselves furnished the means of correction, and the correction of such errors is the very purpose of the canvass. The canvassing board has no other reason for existence.

The argument that a contestant, though strongly suspecting malconduct, would have no means of proving it outside of the ballots themselves does not impress us. Some evidence of the wholesale conspiracy charged could be produced. All of the 1,173 election officers would be competent witnesses to testify as to the manner of making the count. If there was any irregularity in their action such as would authorize a recount, their testimony would disclose it. *Packard v. Craig*, 114 Cal. 95, 45 Pac. 1033; *Kindel v. Le Bert*, *supra*.

In conclusion, we say that if the legislature had intended that the entire vote of any county, and for the same reason, of every county in the state, should be recounted upon mere demand (and that is what the appellant's contention amounts to), it would have been easy to so state. If it was intended that the certificate of election based upon the official count by the election officers should have no force as against an unsupported charge of fraud or incompetence on their part, and that official action shall no longer possess even a *prima facie* presumption of rectitude, then the legislature should have so stated. If such is to be declared the public policy of this state, then the functions of election officials will become an idle form. Much time and expense would be saved by simply limiting their duties to a mere reception and sealing of the ballots and delivering them to the courts for counting in the first instance.

We find no abuse of discretion in the refusal of the trial

court to recount the ballots, in the absence of any evidence of malconduct on the part of the election officials.

The judgment is affirmed.

Crow, C. J., MAIN, FULLERTON, and MORRIS, JJ., concur.

[No. 10795. Department Two. June 13, 1913.]

LLEWELLYN IRON WORKS, *Appellant*, v. J. W. LITTLEFIELD
et al., *Respondents*.¹

MECHANICS' LIENS—WAIVER—TAKING PROMISSORY NOTE—PAYMENT—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 1143, providing that a mechanics' lien is not waived or discharged by the taking of a promissory note, unless "expressly received as payment and so specified therein," a lien for installing an elevator in a building is not waived by the taking of a promissory note, under a contract which merely provided for payment "in terms of a promissory note" and which expressly reserved a lien "until final payment."

ACTIONS—PREMATURE ACTIONS—MATURITY OF DEBT—INSTALLMENTS—BILLS AND NOTES. In an action to foreclose a lien for installments due, as evidenced by a promissory note, judgment can be rendered only for the installments due at the time of the commencement of the action, where there was no provision that failure to meet payments as they became due would cause the entire debt to mature and become at once payable.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered May 6, 1912, in favor of the defendants, after a trial on the merits before the court without a jury, in an action to foreclose a mechanics' lien. Reversed.

Willett & Oleson, for appellant.

Van Dyke & Thomas, for respondents.

MAIN, J.—The purpose of this action is to foreclose a lien for labor and materials.

On August 4, 1910, the defendants, J. W. Littlefield and wife, were the owners of lot 7, Supplemental Plat to Glenn

¹Reported in 132 Pac. 867.

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Park addition to the city of Seattle. On this day they and the plaintiff entered into a written contract, whereby it was provided that the latter should install in a building which was on the above described premises an electric auto-push button elevator for the sum of \$1,765. The provisions of this contract, so far as material at this time, are two, the first of which is:

"This company [referring to the plaintiff] shall have a first and valid lien upon all machinery and apparatus furnished under the terms of this proposal until final payment shall have been made"

The contract was prepared by using the plaintiff's regular printed form. Along the margin of this form, from place to place, were catch or index words indicating the subjects of the different paragraphs opposite thereto. At one place in the margin appears the following: "Terms of Payment." Opposite this, in the body of the instrument, a pen had been drawn through the regular printed provision covering the terms of payment, and there was written in the following: "In terms of promissory note dated Sept. 1, '10." Immediately after the execution of this contract, the plaintiff entered upon its performance. The promissory note which the contract referred to is as follows:

"Seattle, Wash., Sept. 1st, 1910.

"Promissory Note.

"For value received I hereby promise to pay to the Llewellyn Iron Works or order, the sum of Seventeen Hundred Sixty-five (\$1,765) Dollars, payable as follows:

1st payment 3 months.....	\$300.00	
2nd payment 6 months.....	300.00	
3rd payment 9 months.....	200.00	
4th payment 12 months.....	200.00	
5th payment 15 months.....	200.00	
6th payment 18 months.....	200.00	
7th payment 21 months.....	200.00	
8th payment 24 months.....	165.00	\$1,765.00

"To bear interest at the rate of six per cent. per annum, excepting first payment. J. W. Littlefield."

On January 16, 1911, the installation of the elevator was completed. On April 6, 1911, the plaintiff filed its notice of claim of lien. Thereafter, and on the 28th day of November, 1911, the present action was begun upon the contract, seeking to foreclose the lien claimed for labor and materials for the total sum of \$1,765. No reference was made in the complaint to the promissory note. The defendants, Littlefield and wife, in their answer set up the note, and claimed that the taking of the note was a waiver of the lien provided for by statute. In due time the cause was tried before the court without a jury. In the superior court it was stipulated by the respective parties that, in the event a decree of foreclosure was entered, the court should fix an allowance as an attorney's fee to the plaintiff. A personal judgment was entered against the defendants, J. W. Littlefield and wife, in the sum of \$1,400, and interest, this being the total of the installments due at the time of the trial. The judgment denied a foreclosure of the lien. The plaintiff appeals.

The primary question to be determined is whether or not the appellant by accepting the promissory note thereby waived its right to a lien. This question must be determined from a consideration of the language of the statute, the terms of the promissory note, and the provisions of the contract. Rem. & Bal. Code, § 1143 (P. C. 309 § 81), provides:

"The taking of a promissory note or other evidence of indebtedness for any labor performed or material furnished for which lien is created by law, shall not discharge the lien therefor, unless expressly received as payment and so specified therein."

It will be noted that under this section of the statute the taking of a promissory note does not operate to waive the right of lien unless, first, it is expressly received as payment, and second, so specified therein. Neither of these requirements can be found in the note. There is no specification therein that it is to be received as payment. Going back to the written contract: There are two provisions thereof to

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be considered. The excerpt therefrom first above quoted expressly reserves to the plaintiff a first and valid lien upon all machinery and apparatus furnished, until final payment shall have been made. The other provision of the contract material here is that which deals with the question of payment, and is as follows: "In terms of a promissory note dated Sept. 1, 1910." All the terms of the contract must be construed together and each given its proper force and meaning. To construe the language used with reference to payment "in terms of a promissory note" to mean that the note was taken as payment and the lien provided by statute intended thereby to be waived, would be to read out of the contract as meaningless the express provision thereof which provides for the retention of a lien upon all machinery and apparatus furnished. Construing this contract and the note in the light of the terms of the statute, it seems plain that there was not a waiver of the right of lien. The taking of the note did not operate as payment, but by its terms the periods of credit became fixed. The case of *Ward v. Thorndyke*, 65 Wash. 11, 117 Pac. 593, is not out of harmony with the views here expressed. It was there held that the evidence presented justified the inference that, by the terms of the original oral agreement, the note there in question was to be received as payment, which would imply a waiver of the lien. In the present case, there is no inference from the terms of the contract that the note was received in payment.

The right to a lien claimed for materials and labor not being waived, the question then arises as to the amount for which the lien may be foreclosed in the present action. From the facts above stated, it appears that, when the suit was instituted, four payments, totalling the sum of \$1,000, were past due. The action, however, sought to recover \$1,765, the total amount of the debt. It is argued that failure to meet the payments as they became due caused the entire debt to mature and become at once payable notwithstanding the specifications as to the times of payment, but this contention

cannot be sustained. There is no clause in the note providing that, in the event the payments are not made at the time specified, that the whole sum shall, or may at the election of the creditor, become due and payable, in the absence of which, delinquency as to certain payments does not mature the entire debt. In *Foxell v. Fletcher*, 87 N. Y. 476, it is said:

“At the time this action was commenced, two of the monthly installments had become payable, but it does not follow that the whole debt had become due. The debt was, by the agreement and in consideration of the security given, changed from one payable immediately to one payable in monthly installments, and in the absence of a stipulation, that, on default in the payment of any of these, the whole should become due, the plaintiffs were entitled only to recover the installments due at the time of the commencement of the action. They cannot now recover more, without taking the necessary steps to enable them to bring in installments accruing since the commencement of the action.”

The cause will be remanded to the superior court with direction to enter a judgment foreclosing the lien claimed in the sum of \$1,000 and interest, together with an allowance of an attorney's fee in the sum of \$150. The appellant will recover its costs in this court.

CROW, C. J., ELLIS, FULLERTON, and MORRIS, JJ., concur.

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[No. 10992. Department Two. June 13, 1913.]

CRANE COMPANY, *Respondent*, v. UNITED STATES FIDELITY & GUARANTY COMPANY, *Appellant*.¹

MECHANICS' LIENS—CONTRACTOR'S BOND—LIABILITY—GOODS RETURNED. A contractor's liability upon an indemnity bond given pursuant to Rem. & Bal. Code, § 1159, conditioned to pay all laborers or materialmen "all just debts, dues and demands incurred in the performance of the work" is not dependent upon his right to claim a lien under Id., § 1129; hence extends to materials ordered and sold in good faith but not actually used, where no right was reserved to return goods not actually used.

PAYMENT—APPLICATION—SECURED DEBTS. Where a contractor has an open account with a materialman for goods supplied for various jobs, payments made without any directions as to their application may be applied by the materialman as he sees fit, and need not be applied to a debt secured by an indemnity bond.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 13, 1912, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on an indemnity bond. Affirmed.

McClure & McClure (Joseph A. M'Caleb, of counsel), for appellant.

Walter S. Fulton, for respondent.

MAIN, J.—This action was brought for the purpose of recovering upon an indemnity bond. The plaintiff, Crane Company, and the defendant United States Fidelity & Guaranty Company are both foreign corporations, but authorized to do business in the state of Washington. The defendant H. Sweeney transacted business under the name of H. Sweeney & Company.

On June 25th, 1910, Seattle School District No. 1, King county, contracted for the construction of an annex to the

¹Reported in 132 Pac. 872.

public school building in the city of Seattle, which is known as the Broadway High School. The contract for the installation of the plumbing in this annex was awarded to H. Sweeney & Company. The United States Fidelity & Guaranty Company, for the purpose of protecting and indemnifying the school district from claims and demands of laborers, mechanics, subcontractors, materialmen, etc., as provided by ch. 207, Laws of 1909, p. 716 (Rem. & Bal. Code, § 1159; P. C. 309 § 93), executed and delivered to the district the bond upon which this action is based. The bond was conditioned that the contractor, H. Sweeney & Company, "shall faithfully perform and fully complete said contract, according to the terms, conditions and covenants therein contained, and shall pay all laborers, mechanics, subcontractors or materialmen and all persons furnishing provisions and supplies for the carrying on of said work, all just debts, dues and demands incurred in the performance of said work, and when completed shall surrender and deliver the same to said Seattle School District No. 1, free from all liens, claims or demands whatsoever, then this obligation shall be null and void; otherwise to remain in full force and effect."

Between the 16th day of August, 1910, and the 21st day of August, 1911, the plaintiff, at the special instance and request of H. Sweeney & Company, sold and delivered to him for installation in the high school annex, plumbing goods and supplies of the reasonable and agreed value of \$5,866.81, against which amount a credit of \$183.07 was allowed. These supplies were contracted for by H. Sweeney & Company in good faith and in substantially the amount needed to equip the building. In like good faith, goods of the kind and quantity ordered were delivered at the building by the plaintiff. On the heading of the invoice forms on which the goods were billed appears the following: "Terms cash with exchange on Seattle;" also, "interest after maturity at the rate of ten per cent per annum." After the completion of the building, of the goods which had been furnished by the

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plaintiff, there remained not used remnants to the value of \$364.12, as testified to by one witness, and \$824.42, as testified to by another. These goods had remained for some months exposed to the elements and were not in the same new condition as when delivered. H. Sweeney & Company claimed the right to redeliver these remnants to the plaintiff and receive credit therefor. This the plaintiff denied, and refused to accept or receive them.

On August 16, 1910, and prior thereto, H. Sweeney & Company had a current, open and running account with the plaintiff for goods sold and delivered. On this account were charged goods furnished for other jobs than the one here in question. In fact, all goods sold by the plaintiff to H. Sweeney & Company, both before and after August 16, 1910, and up to and including the date of the furnishing of the last materials for the high school annex, were charged upon this account. From time to time payments were made upon the account. On the last day of each month, interest against the balance of the account shown on the first day of such month at the rate of ten per cent per annum, was charged and added to the account, thus compounding the interest monthly at the rate of ten per cent per annum. Subsequent to August 16, 1910, the plaintiff made sales of materials to H. Sweeney & Company amounting to \$15,989.56, of which \$5,703.74 was for goods sent to the high school job. During this period, Sweeney & Company paid the plaintiff the sum of \$9,623.78, and received credit from other sources of \$10,489.96. The trial court found that there was a balance due the plaintiff on the account, exclusive of all credits, in the sum of \$8,735.49, and that entering into this amount was \$1,600 interest which had been figured upon all jobs, including the one in question, and that the interest charged upon the price of the goods that went into the high school contract was \$366.36 at the time of the commencement of the action. Judgment was entered in the sum of \$5,703.74, with interest thereon at the legal rate from December 11, 1911,

that being the date when the plaintiff in writing notified School District No. 1 that it had a claim against the bond taken from H. Sweeney & Company. Motion for new trial being made and overruled, the cause is brought here on appeal.

The first point urged by the appellant is that it was entitled to a credit of \$824.42 for the material which was not used in the building. Much space in the briefs is devoted to argument and the citation of authorities upon what is the proper construction of Rem. & Bal. Code, § 1129 (P. C. 309 § 53), which gives a right of lien for labor performed or material furnished upon private work. But it does not seem to us that either the argument or the authorities cited bearing upon the construction of this statute are germane in the present case, as this is an action not to foreclose a lien for materials furnished to be used in a building, but is for the purpose of recovering upon an indemnity bond, conditioned, as above set out, that the contractor will pay materialmen all just debts, dues and demands incurred by the contractor in the performance of the work. It is not denied that H. Sweeney & Company ordered the goods for which recovery is sought and in the kind and quantities supplied; neither is the price thereof questioned. In addition, there is no claim that, in the contract Sweeney & Company made with the respondent, the right was reserved to return any goods which were not made use of in the building. It seems plain, therefore, that the debt incurred for these materials was an obligation of H. Sweeney & Company which was guaranteed by the bond.

The appellant's second contention is relative to the application of payments made upon the account. No direction was given as to their application, and of the moneys which the respondent received from H. Sweeney & Company after the 16th day of August, 1910, no part of it, as shown by the evidence, was applied upon the charge for materials for the high school job. Sweeney & Company not having di-

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rected the application of any of the payments, the respondent had the right to apply them as it saw fit. In *Hughes & Co. v. Flint*, 61 Wash. 460, 112 Pac. 633, it is said: .

“It is undoubtedly the rule, as is contended by appellant, that, if no direction is made by a debtor who owes several accounts, the creditor may apply a payment as he sees fit; and if there be no direction or specific application by the creditor, the law will apply it to the oldest account.”

This is the rule when payment is made to the obligee in a bond which had been given to secure future debts. And if payment is made to the obligee without direction as to its application, he is not required to apply it upon the debt secured by the bond. *Post-Intelligencer Co. v. Harris*, 11 Wash. 500, 39 Pac. 965.

It is finally urged that the interest charges, being compounded from month to month, were illegal and void. This question does not appear to be material at the present time. The judgment entered was for \$5,703.74, which was the price and value of the materials, and interest was allowed only from the 21st day of December, 1911, which was the date of the notice to the school district that the respondent relied upon the bond, and then only at the legal rate.

The judgment will therefore be affirmed.

Crow, C. J., ELLIS, FULLERTON, and MORRIS, JJ., concur.

[No. 10958. Department One. June 13, 1913.]

THE STATE OF WASHINGTON, *Appellant*, v. JOHN C. PIVER,
Respondent.¹

LIBEL AND SLANDER—CRIMINAL PROSECUTION—NONRESIDENT PUBLISHERS—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 2428, providing that in criminal libel, the editor or proprietor of a book or paper published in this state shall be proceeded against in the county where the book or paper was published, and Id., § 2429, providing that "every other person" publishing a libel in this state may be proceeded against in any county where such libelous matter was "published or circulated" the last section includes editors, proprietors and publishers of books and papers published without the state and circulated within the state.

SAME—CRIMINAL PROSECUTION—VENUE—NONRESIDENTS. The state has the power to define libel and punish offenders against the law within this state, although they are nonresidents and publish the libel outside of the state and circulate it in this state through the mails.

SAME. A nonresident publishing a libel as defined by our statutes and circulating it in this state, is punishable in this state, although punishment may be inflicted elsewhere for the commission of the offense in other jurisdictions.

Appeal from a judgment of the superior court for King county, Ronald, J., entered November 27, 1912, dismissing a prosecution for libel. Reversed.

John F. Murphy and *S. H. Steele*, for appellant.

John W. Roberts, for respondent.

✓ MOUNT, J.—The defendant was charged with criminal libel, in the superior court of King county. Upon the trial of the case, the trial court was of the opinion that it had no jurisdiction. The case was therefore dismissed. The state has appealed.

It was stipulated, in substance, at the trial that the defendant was, at the time of the alleged publication, the editor and

¹Reported in 132 Pac. 858.

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proprietor of the Underwriters' Report, a newspaper edited, printed and published in San Francisco, California, and from San Francisco circulated through the United States mail in King county, Washington, as well as in other counties and states of the United States; that the defendant maintained no agent or agency within King county or the state of Washington for the circulation of said publication, and that it circulated in King county, Washington, only to about twenty-five subscribers; that these subscribers received the publication through the United States mail; that the defendant's home and place of residence was and is in San Francisco, California; that he went to Spokane, Washington, to attend an insurance convention, and while in attendance upon that convention, was arrested in this state upon an information filed in King county, Washington.

The statutes of this state relating to criminal libel provide:

Rem. & Bal. Code:

"Section 2424. Every malicious publication by writing, printing, picture, effigy, sign or otherwise than mere speech, which shall tend . . . to injure any person, corporation or association of persons in his or their business or occupation, shall be a libel. Every person who publishes a libel shall be guilty of a gross misdemeanor." (P. C. 135 § 343).

"Section 2426. Any method by which matter charged as libelous may be communicated to another shall be deemed a publication thereof." (P. C. 135 § 347).

"Section 2428. No prosecution for libel shall be maintained against a reporter, editor, proprietor, or publisher of a newspaper for the publication therein of a fair and true report of any judicial, legislative or other public and official proceeding, or of any statement, speech, argument or debate in the course of the same, without proving actual malice in making the report. The editor or proprietor of a book, newspaper or serial shall be proceeded against in the county where such book, newspaper or serial is published." (P. C. 135 § 351).

“Section 2429. Every other person publishing a libel in this state may be proceeded against in any county where such libelous matter was published or circulated, but a person shall not be proceeded against for the publication of the same libel against the same person in more than one county.” (P. C. 135 § 353).

It is argued by the respondent that there is no provision in these statutes which authorizes the prosecution of an editor or publisher of a newspaper published outside of this state although it be circulated herein. The provision of § 2428 that “the editor or proprietor of a book, newspaper or serial shall be proceeded against in the county where such book, newspaper or serial is published,” clearly refers to a publication within this state. It is manifest that the legislature by this provision was not attempting to legislate against publications outside of the state. It is clear, we think, that this clause should be read as follows:

“The editor or proprietor of a book, newspaper or serial published in this state, shall be proceeded against in the county where such book, newspaper or serial is published.”

The next section provides: “Every other person publishing a libel in this state may be proceeded against in any county where such libelous matter was published or circulated.” It is clear, we think, that the words “every other person” refer to persons other than editors, proprietors or publishers of books, newspapers or serials published within this state, and includes editors, proprietors and publishers of books, newspapers or serials published without the state and circulated within the state. This construction seems too plain for serious dispute. It was plainly the intention of the legislature that, for the publication of libelous matter by editors, proprietors or publishers within the state, prosecution should be had in the county of the publication; and that every other person publishing a libel in this state might be prosecuted in any county where the libelous matter was published or circulated; and the publication or circulation as

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mentioned in that section refers back to § 2426 as any method by which matter charged to be libelous may be communicated to another, and clearly did not refer to the primary publication.

It is argued by the respondent that this construction of our statute subjects the publisher of a libel to a trial and punishment away from his home in every county of the state where his publication is circulated, and in every state and county of the Union; that such a construction would be an unreasonable construction to place upon the statute. There can be no doubt, we think, that an action or prosecution for libel may, as a general rule, be brought in the jurisdiction where the defendant resides or is found, "*or in any jurisdiction where the defamatory matter was published or circulated.*" 18 Am. & Eng. Ency. Law (2d ed.), p. 1119; Clark, Criminal Law (2d ed.), p. 421; 3 Wharton, Criminal Law (11th ed.), § 1942; 2 McClain, Criminal Law, § 1058; *State ex rel. Taubman v. Huston* (19 S. D. 644, 104 N. W. 451, 117 Am. St. 970), 9 Am. & Eng. Ann. Cas. p. 381, and note p. 382.

This state clearly has the power to define a libel and prescribe the punishment therefor, and to punish offenders against the law within this state. If a person residing without the state publishes a libel against a citizen of the state and circulates such libel within the state, he is as much subject to punishment within the state as any citizen of the state. The mere fact that he resides outside of the state and publishes the libel outside of the state is no excuse for a violation of the law of the state. And the fact that the same publication may subject him to prosecution in the state of his residence, or in any other state, does not relieve him from the penalty for a violation of the law of this state. There can be no doubt of the power of the state to prosecute a nonresident of the state who commits a crime against the law of the state by shooting across the line, or by causing a nuisance in a stream running from one state into another which

results in injury to this state. The publishing of a libel stands on exactly the same footing. As we have seen above, the statutes of this state provide for crimes of that character and for their punishment, and the mere fact that punishment may also be inflicted elsewhere for the commission of the offense in numerous other jurisdictions, does not relieve this state of the right to punish for a violation of its laws.

The case of *United States v. Smith*, 173 Fed. 227, was a case very much like this case, where it was sought to remove the defendant to the District of Columbia from the state of Indiana for trial. It was there held that, for an alleged criminal libel published in Indiana only and distributed in the District of Columbia, the court in the District of Columbia was without jurisdiction to try the defendant for such alleged libel. It does not appear in the opinion in that case that there was any statute in the District of Columbia making it a crime for the circulation of a libel within the District of Columbia. Many things are said in that opinion which are no doubt correct. But we are satisfied that if the statutes in the District of Columbia made it a crime to circulate a libel therein, that the courts of the District of Columbia would have jurisdiction to try a person accused of the offense of circulating a libel therein.

The respondent also cites the case of *United States v. Press Pub. Co.*, 219 U. S. 1. In that case the supreme court held that, where the laws of the state of New York prescribed punishment for the publication of a criminal libel, the United States court was without jurisdiction, even though the circulation was upon a reservation of the United States. We are satisfied that the rule of that case, or the rule of the *Smith* case, does not control the case at bar.

There is much force in the contention that a person accused of crime should be tried before a jury of his peers at the place where the offense was committed. But the application of that principle loses its force when we consider that the offense of circulating a libel in this state is committed in this

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state, and the residence of the person circulating the libel, or the place of primary publication of the libel, is not to be considered when he is brought to trial in the jurisdiction where the offense was committed. Circulation of the libel in King county was the commission of the crime in King county, in this state, under our statute, and that is the crime with which he is charged, and that is the place in this state where the trial must be had.

We see no legal or constitutional objections to these statutes. The judgment of the trial court is therefore reversed, and the case remanded for further proceedings.

Crow, C. J., Gose, Chadwick, and Parker, JJ., concur. —

[No. 11113. Department One. June 13, 1913.]

LYMAN HINCKLEY *et al.*, *Respondents*, v. THE CITY OF
SEATTLE, *Appellant*.¹

EMINENT DOMAIN—DAMAGES—AWARD — JUDGMENT — CONCLUSIVE-
NESS—RES JUDICATA. A condemnation award for damages to an
abutting lot from a fill raising the grade of a street is not *res
judicata* or a bar to a subsequent action to recover damages when the
fill in the street slid down upon the lot on account of defects in the
engineering plans and the failure of the city to condemn sufficient
land to sustain the fill, where the subsequent damage was not fore-
seen by the engineers planning the improvement, and rested in
speculation or conjecture until it occurred.

MUNICIPAL CORPORATIONS—IMPROVEMENTS — DAMAGES — CONTRIBU-
TORY NEGLIGENCE. It is not contributory negligence for the owner
of a lot, injured by a slide by reason of the public improvement of
a street, to excavate the lot to a street grade, which was reasonably
necessary for the use of the lot.

Appeal from a judgment of the superior court for King
county, Myers, J., entered January 10, 1913, upon the ver-
dict of a jury rendered in favor of the plaintiffs, in an action
for damages. Affirmed.

¹Reported in 132 Pac. 855.

James E. Bradford and *C. B. White*, for appellant.

Peterson & Macbride, for respondents.

CHADWICK, J.—The material facts in this case are not disputed. The plaintiffs are the owners of a lot extending from Dexter avenue to Westlake avenue, in the city of Seattle. The lot slopes from Dexter avenue down to Westlake avenue. The city of Seattle condemned the right to raise the grade of Dexter avenue, to widen it 7 feet, and to make a bank with a slope of one and one-half to one on the property of the plaintiffs. Damages were assessed and paid by the city, and Dexter avenue was improved in accordance with the original plans and specifications. After the fill had been made, the earth that had been put into Dexter avenue began to sink, and was repeatedly filled by the city. In the meantime, plaintiffs had excavated that part of their lot abutting on Westlake avenue so as to make it level with that street. After a time Dexter avenue began to sink, and the fill on the Dexter avenue side of their property began to slide down hill, and the earth in that part of the lot that had been excavated or cut down to the street level bulged or buckled. The foundation of plaintiffs' dwelling house was destroyed and the house had to be removed. We take it from the record that, barring the pushing down of the fill or bank and the buckling of that part of the lot which had been cut to the level of Westlake avenue, there was no great change in the contour of the land. Plaintiffs brought this action to recover damages. From a verdict in their favor, the city has appealed.

The first and principal contention of the city is that all of the issues raised in this case were adjudicated in the Dexter avenue regrade case, and that it is not liable for any damages which may have been caused by the *weight* of the fill imposed upon respondents' property.

Undoubtedly the city believed, when it drew its plans for the regrade of Dexter avenue, that it had condemned enough land for the bank, and to sustain the fill it contemplated and

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which it thereafter made in Dexter avenue abutting plaintiffs' property. Appellant invokes the rule that "all matters that were, should have been, might have been, or could have been raised in the condemnation proceedings are adjudicated and forever foreclosed by that judgment." This may be admitted, but it does not answer the question whether a loss that neither party had any reason to anticipate and the possibility of which, if suggested, would have been rejected as speculative and conjectural by the trial court can now be compensated in damages. In the case brought by the *Olympia Light & Power Co. v. Harris*, 58 Wash. 410, 108 Pac. 940, the claimant undertook to show that a ridge which the company purposed to use as a retaining wall for the waters of a lake when raised to a higher level would not successfully retain the waters, but would permit of leakage or seepage. We said:

"As to whether it will or not is now conjectural, and must be until it is put to the desired use. If it then should be ascertained that it is ineffectual, respondents have their remedy in an action where the damage can be readily and easily determined from the physical facts then existing, and not as a matter of speculation and conjecture as it must now be."

In the Dexter avenue condemnation, the city proceeded regularly. It condemned the right to raise the grade and to make a slope on plaintiffs' property of one and one-half to one. It fixed this ratio because from experience it had found it to be sufficient. On the other hand, plaintiffs graded that part of their lot abutting on Westlake avenue to conform to the established grade. This was a lawful thing to do, a necessary thing to do if the property was to be made available, and a thing to be anticipated in the natural order of events. The thing that was not anticipated was the sinking of the fill in the street, which had to be backfilled for a long time, and which not only added to the weight of the fill as called for in the plan, but also pushed the slope further

down on plaintiffs' property, and from some cause, or combination of causes, made the earth on the graded part of the lot buckle up. An engineering problem is presented. Manifestly a property owner should not be held to the doctrine of *res judicata* when he has failed to set up as an item of damages something that was not foreseen by the engineers who drew the plans for the improvement of Dexter avenue, or those who had charge of the work.

We find no hesitation in applying the doctrine of *Casassa v. Seattle*, 66 Wash. 146, 119 Pac. 13, to the facts in this case. There the city assumed that a one to one slope would be sufficient. The property owner moved his house back beyond the slope: "When the contractors for the city proceeded with the work of excavation, the slope was not sufficient to hold the soil, which on account of its character slid into the cut, and carried with it the houses, which were completely demolished." A recovery was had, although it was argued, and with much force, that a plan for a one to one bank, taking into consideration the "character of the soil and its disposition to slide," was patently deficient, and the consequent damages must have been considered by the jury. A condemnation must proceed along the lines marked out by the condemner; the property owner cannot anticipate, and will not be heard to speculate, upon possible consequences. They must be reasonably probable. *Olympia Light & Power Co. v. Harris*, *supra*. Having in mind these principles, we held that, where the "character of the soil" was such as to defeat the estimates and the opinions of the engineers, more land was occupied than was contemplated and that additional damages could be recovered. The damage sustained by plaintiffs may be justly attributed to a physical condition, the character of the underlying soil. The case of *Provine v. Seattle*, 59 Wash. 681, 110 Pac. 619, is also relied on. In that case the trespass was wilful and the verdict could have been sustained in any event; it may, however, be considered

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as authority to sustain the holding that a city cannot take more than it has paid for.

The Pennsylvania Railroad Company "by authority of law," which we may assume for the purposes of this case is the power of eminent domain, proceeded to construct a connecting line over an embankment between two points on its main track for the purpose of avoiding a dangerous and expensive curve. The company put into the embankment or fill about 160,000 cubic yards of earth and other filling, when the surface of property owned by an abutting owner irregularly upheaved so that his building was almost completely wrecked and was deserted by his tenants. It was the theory of the complainant that the upheaval was due to the deposit of filling material upon soft ground; that the silt and mud were thereby forced back upon adjacent property, "or that the filling material itself moves upon and through the mud, under the surface of his lot and up through that surface, and he insists that from one or the other or both of these causes the surface of the lot has been and is being disturbed." The right to recover damages in such a case is admitted. *Herbert v. Pennsylvania R. Co.*, 43 N. J. Eq. 21, 10 Atl. 872. The same railroad company "filled in upon its lands a quantity of earth and raised an embankment of great height, and thereby forced and pressed a large quantity of earth into and upon the lots of another beneath the surface of the same, and thereby upheaved the surface and caused the foundation and walls of the dwelling house thereupon to crack and topple over." Upon this statement of facts it was held that the complainant had a cause of action. *Costigan v. Pennsylvania R. Co.*, 54 N. J. L. 233, 23 Atl. 810.

In *Roushlanke v. Chicago & A. R. Co.*, 115 Ind. 106, 17 N. E. 198, a railway company had received a deed and paid a consideration for land upon which to construct and operate its road. The complaint alleged:

“That a portion of the land over which the railroad was constructed was marshy; that through that portion the railway company made an embankment about twelve feet high; that, after the road had been used for about six months, the embankment . . . began to sink; that, to keep the grade up to the original height, the railway company deposited upon the top of the embankment a large amount of earth, sand and other material; that, as the same was thus deposited, the embankment kept sinking until the road-bed finally became settled and solid; that a large amount of the earth and other material thus deposited, as it sank, spread and extended under the surface of the land beyond the land of the railway company and upheaved the plaintiff's land adjoining the right of way and rendered worthless several acres of it.”

We understand the law of eminent domain to be the same whether it is invoked by a city or by a public service corporation, and this case is strangely like the one at bar. There the rule is laid down, as it has been often declared in this state, that in considering the damages to be assessed, the value of the land appropriated should be considered, together with any injury to the residue of the land naturally resulting or that might reasonably be expected to result from the appropriation and construction of the road in a proper manner. In passing upon the main question the court said:

“The real question in the case before us is not one of negligence, but of an encroachment upon land outside of the company's right of way. When the company discovered that its road-bed was sinking, could it, without making compensation, or the payment of damages, have gone upon appellant's land and constructed walls or banks to prevent the road-bed from sinking and spreading? Certainly not. That it did not do, but, what in effect was the same thing, it filled in earth and other materials until the embankment spread out beyond the right of way upon appellant's adjoining lands, and upheaved the surface and caused the injury described in the complaint.

“It may be that the company had no knowledge that the filling would cause the spreading of the embankment and the upheaval of appellant's land. Whether or not it had such

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knowledge is not stated in the complaint; nor do we think that it is material in this case. By reason of the filling upon the embankment it was caused to spread upon appellant's land and caused the injury. That the railway company may have had no knowledge that the filling would cause the injury is not sufficient to exonerate it from liability.

"The fact remains that appellant granted to the railway company a strip of land upon which to construct and operate its road, and it has so constructed it as to make it rest, not only upon the strip thus granted, but also upon his adjoining land, not granted. The railway company is thus occupying land which was not granted to it, and which neither party intended should be either granted to it or occupied by its road.

"The road is no less an encroachment upon appellant's land because its foundation is beneath the surface. That fact might affect the amount of damages, but it does not alter the rights of the parties. The railway company had a right to construct its road upon the strip of land granted, but it has no right to occupy additional land without compensation or the payment of damages. The strip of land was granted before the road was constructed, and hence, the consideration paid must be presumed to have been measured by the value of the land granted and the anticipated damages, in the light of surrounding circumstances and the knowledge of the parties at that time. It surely was not intended at that time that the road-bed should cover and rest upon land outside of the strip granted. Nor could it have been anticipated that in the construction of the road land outside of the right of way would be occupied by the road-bed or any portion of it. It would not be reasonable, therefore, to assume that in fixing the compensation the parties included damages for such encroachment.

"Had the strip of land been taken by condemnation instead of by grant, the commissioners or jury in assessing the damages could not have included damages from such encroachment: First, because they could not have assumed that the railway company would voluntarily so construct its road as to make it rest partially upon land outside of the right of way. To have assumed that, and to have assessed damages accordingly, would have been to assume that the railway company would commit a trespass, and to have assessed, in

advance, damages resulting from such trespass. Second, because they could not have known in advance that the result of the fill would be to cause the embankment to so spread as to encroach upon appellant's land and cause injury. Such an injury could not reasonably have been expected to result from the proper construction of the road.

"It will not be presumed that the parties included in the price agreed upon at the time of and for the grant any amount for injuries which would not properly have been considered by the commissioners and jury, had the right of way been taken by condemnation proceedings."

To further sustain its position that the damages now claimed cannot be recovered in another suit, the city cites and relies upon the following cases: *Compton v. Seattle*, 38 Wash. 514, 80 Pac. 575; *Johnson v. Spokane*, 72 Wash. 298, 130 Pac. 341; *Carpenter-McNeil Inv. Co. v. Spokane*, 73 Wash. 232, 131 Pac. 823; and for the sake of future reference, the case of *Grosshoff v. Spokane*, 73 Wash. 681, 132 Pac. 643, may be added. In the *Compton* case, the court held that the matters sought to be litigated in the principal case were actually litigated in the condemnation case. In the *Johnson* case, the item sought to be recovered was on account of the lowering of the surface of the street, and the court held, as it held in the *Grosshoff* case, that this was a question that was open to the plaintiff and might have been litigated in the condemnation suit. In the *Carpenter-McNeil* case, the work which it was alleged was negligently performed had been done at the time the condemnation suit was tried. It was accordingly held that the plaintiff could have set up in that suit all damages claimed by him, not only on account of the physical change of the grade, but all that had resulted from the manner in which the work was done. The corner stone of that case was the statute, Rem. & Bal. Code, § 7820 (P. C. 171 § 135). We find nothing in these cases that would defeat the right of these plaintiffs to recover.

There are other assignments of error predicated upon the instructions. The pleadings were drawn upon the theory

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of negligence, and the plea of contributory negligence was tendered as a defense. Upon the oral argument it seemed to be conceded by all parties that this is not a case of negligence. If it were so, we would hold that the plaintiffs were not guilty of contributory negligence in excavating that part of their lot abutting on Westlake avenue.

We have not overlooked the contention of the city that, if the lot had been left in its natural condition and unexcavated, there would have been no disturbance. This is not sound. City property located upon the slope of a hill must ordinarily be put to some use, and if necessary must be cut or filled. As hereinbefore suggested, the owner cannot be held negligent or his recovery defeated if he pursues his lawful right; otherwise the law would demand that all property taken or damaged for a public use be bought outright.

The case was not tried upon a correct theory of the law, but we are satisfied that plaintiffs are entitled to a judgment against the defendant, and the amount of the verdict not being seriously challenged, we will not discuss the questions raised on the instructions.

Affirmed.

CROW, C. J., GOSE, MOUNT, and PARKER, JJ., concur.

[No. 10581. Department One. June 13, 1913.]

**W. L. BENHAM *et al.*, Respondents, v. COLUMBIA CANAL
COMPANY, Appellant.¹**

VENDOR AND PURCHASER—CONTRACT—CONSTRUCTION—FORFEITURE—INDEPENDENT COVENANTS. The vendor's covenant to furnish water is an independent covenant and does not militate against a forfeiture clause in the contract for failure to pay taxes, interest and a maintenance fee, and default in making improvements within a specified time, where time was made the essence of the contract; especially where the maintenance fee was due before there could be any substantial failure to furnish water, or the ground prepared to receive it.

SPECIFIC PERFORMANCE—PARTIES ENTITLED—PARTIES IN DEFAULT. Where time is the essence of the contract, specific performance will not be decreed at the suit of a vendee in default not acquiesced in by the vendor.

VENDOR AND PURCHASER—RESCISSION BY VENDOR—RIGHT TO RESCIND—INDORSEMENT OF NOTES AS COLLATERAL. The indorsement as collateral of notes given for the purchase price of land, does not prevent rescission by the vendor on the vendee's default, where the notes were subject to withdrawal and under the control of the vendor; nor where the right to rescind, if in abeyance, was revived by withdrawal of the notes and their return to the vendee.

SAME—RIGHT TO RESCIND—SET-OFF. The vendor is not precluded from rescinding the contract on the default of the vendee, as provided in the forfeiture clause, on an account of a set-off which the vendee wanted applied on the contract, where the claim was disputed, the vendor never agreed to make the application, the contract called for payment in "lawful money" and the vendee had also broken his agreement to fence and improve the land.

SAME—RESCISSION BY VENDOR—ACQUIESCENCE IN RESCISSION. A vendee acquiesced in a rescission, and cannot thereafter have a set-off applied in payment of the contract, where the vendor gave written notice of rescission and returned the notes, on the default of the vendee, who retained the notes and thereafter attempted by suit to collect the sum due on the set-off, and rested on his rights for three years until the land had trebled in value and part of it had been resold.

¹Reported in 132 Pac. 884.

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TRIAL—OBJECTIONS TO EVIDENCE. An objection to a summons and complaint as "irrelevant, incompetent and immaterial" does not raise the point that the signature had not been sufficiently identified.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered January 30, 1912, in favor of the plaintiffs, after a trial on the merits before the court, in an action for specific performance. Reversed.

Shank & Smith and Pedigo & Smith, for appellant.

Sharpstein & Sharpstein, for respondents.

GOSE, J.—On the 21st day of October, 1905, the plaintiff W. L. Benham, as purchaser, and the defendant, a Washington corporation, as the vendor, entered into a contract for the purchase and sale of eight five-acre tracts of land, "together with the appurtenances thereunto belonging and a water right for the same," situate at Attalia, in Walla Walla county. It was stipulated in the contract that the purchaser should pay for the land "and appurtenances" the sum of \$3,800, of which \$800 was paid at the time the contract was delivered. The balance was to be paid in \$1,000 installments, payable respectively on or before one, two, and three years from date. It was agreed, first, that these payments should be, and they were, evidenced by the purchaser's notes bearing even date with the contract, with interest at the rate of eight per cent per annum, payable annually; second, that the purchaser should pay to the vendor, on the first Monday of May of each year, the sum of \$80 "to cover cost of maintenance and operation of the canals and laterals," subject to the right of the vendor "to refuse or cease to permit him to have the use of the water upon the failure of the purchaser to pay the annual maintenance fee," at any time during such default; third, that he would pay taxes for 1905 falling due February, 1906, and that each year thereafter he would pay all taxes and assessments levied against the property "before the same become delinquent"; fourth, that he would erect a substantial and lawful fence around the en-

tire property within one year from the date of the contract, and "cultivate at least one-half of said land within one year from date." In respect to the water, it was agreed that the vendor should cause to be delivered to the purchaser "the water herein provided for"; that the amount of water to be used on the land should be the amount necessary for irrigation purposes between the 15th day of April and the 15th day of October of each year, not exceeding one cubic foot of water per second of time for 160 acres of land; that he should receive the water at headgate points along the company's main canal or from a lateral at such point as to the company should seem most practicable, and that the company should construct suitable measuring boxes or gates, prescribe the manner of delivering, measuring, and regulating the supply to the purchaser, and make reasonable rules and regulations for the service of the district at large, at points of delivery along its main canal, it being agreed that the company owned large tracts of neighboring land which it was selling and which it would also supply with water, all of which, including the land in controversy, it was agreed "must be irrigated to make it valuable." The contract contains two forfeiture clauses, in terms following:

"Time is hereby expressly made to be of the essence of this agreement, and it is especially understood and agreed that in case the purchaser fails to make the payments as set forth in this agreement, or any of them, at the time specified, then the company may, upon any such default, at its option, declare by written notice to the purchaser this agreement to be null and void, and thereupon all rights and interests of the purchasers herein shall utterly cease and determine, and this agreement shall be void, and of no effect, and all payments theretofore made hereunder shall and all improvements shall be forfeited to this company, and the purchaser shall have no right to reclamation or compensation for such moneys paid or improvements made by him, and said land shall remain vested in the company as absolutely and completely as if this agreement had never been made, and upon request the purchaser will immediately surrender possession and control of

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said land and all the improvements that have been made thereon.

"In case the purchaser shall fail to pay when due any installment of principal or interest, or the annual maintenance charge, or to pay any taxes or assessments as hereinbefore provided, or fail to perform any other covenant of this agreement, then the whole amount of principal unpaid may at the option of the company be made forthwith due and payable, and, in case of any of the said defaults on the part of the purchaser, this agreement may at the option of the company be declared null and void, and thereupon all payments that shall have been made, and all buildings and improvements on said land, shall be and forever remain the absolute property of the company; and in case of any of said defaults the company shall have the right to shut off the supply of water to the said land until such defaults are each and every of them removed. It is hereby mutually agreed that a written notice mailed to the address of the purchaser as registered or on file in the company's office shall constitute a legal and proper notice of default on the part of the purchaser. The purchaser shall advise the company of any change of address. By availing itself of either of said remedies in case of default, the company shall not be prevented from taking the benefits of any other of said remedies, or any other remedy which it may have according to law, it being understood that each and every of said remedies is cumulative and additional to the remedies which the company would otherwise have."

The purchaser did not pay either the interest, amounting to \$240, which became due on October 21, 1906, or the maintenance charge of \$80, which became due on the first Monday of May, 1906, or the 1905 or other taxes, and did not fence or cultivate any part of the land. In January, 1907, the vendor notified him that it rescinded the contract on account of his default, and on June 19 following, canceled and forwarded his notes to him by mail. These notes he has ever since retained. The vendor thereupon took possession of the land, and before the commencement of the action, it made three several contracts for the sale of five-acre tracts at \$300 per acre, upon each of which a substantial payment was made contemporaneously with the execution of the contract. In

November, 1909, the purchaser, his wife uniting, commenced this action for the specific performance of the contract.

After alleging the making of the contract, it is alleged that, during the entire year of 1905, the defendant was indebted to the plaintiff husband in the sum of \$2,200, "no part of which sum has been paid, except as the same may be applied or may have been applied in payment of the purchase price of the land." During the progress of the trial, they were permitted to amend this averment by adding "which sum plaintiffs have requested to be applied on this contract." It is further alleged, in effect, that the rescission was ineffective because the defendant did not prior thereto cause to be delivered to the plaintiff the water provided for in the contract, or any water whatever, and did not locate any lateral for the plaintiffs, and did not construct measuring boxes or gates, or prescribe any manner for delivering, measuring, or regulating the supply of water; that without water the land, which is arid, could not be cultivated; that if plowed before water was placed upon it with which to irrigate it, it would become loose and dry so that it would be blown by the winds and rendered less productive. It was further alleged that the plaintiffs had tendered \$1,350, which with the claim of \$2,200 asserted against the defendant, would pay the purchase price of the land; that at the time of the tender, they demanded a conveyance of the land conformably to the contract, and that the defendant refused to accept the tender or to recognize that they had any right in the land. The money tendered was placed in the registry of the court.

The defendant denied that it owed the plaintiffs any sum of money, denied that the plaintiffs had made any request to have any sum applied on the contract, and denied that it had breached its contract in any respect. It alleged affirmatively that, if it ever owed the plaintiffs any sum of money, such indebtedness was not evidenced by any writing, and accrued more than three years prior to the commencement of the action and was barred by the statute. It further alleged that,

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because of the failure of the plaintiffs to perform the contract other than the initial payment, it terminated the contract in 1907 by written notice mailed to and received by them, retook possession of the land, and that the plaintiffs acquiesced in the rescission. It is also alleged that, while the plaintiffs were thus acquiescent, it sold to third persons for value "much or all" of the land in controversy, and that the land so sold has been extensively improved at the expense of the purchaser, and that the plaintiffs are in justice and equity estopped to assert any right under the contract. These matters were traversed by the reply.

The judgment provides that, upon payment of \$3,000 by the defendant to the clerk of the court for the benefit of the plaintiffs, within sixty days from the date of the judgment, the contract be annulled and delivered to the defendant for cancellation, and that thereupon the clerk should pay to the plaintiffs the \$1,350 deposited by them as a tender. It was further adjudged that in default of such payment, the contract be specifically enforced as to five of the lots described in the decree; that the defendant should convey them to plaintiffs by good and sufficient deed in fee simple, clear of incumbrances caused or suffered by it, and that, upon its failure so to do, a commissioner named in the decree should make the conveyance; that thereupon the clerk should repay to the plaintiffs the \$1,350 deposited as a tender, the same to constitute "full compensation for the breach of the contract" by the defendant in putting it out of its power to convey the remainder of the land. The court made no findings. The defendant has appealed.

If we understand the respondents' position, it is two-fold in its nature: (1) That the covenant upon the part of the appellant to furnish water was a dependent covenant, and had been broken when the first interest payment fell due; and (2) that, if it be construed as an independent covenant, the appellant could not rescind the contract for nonperformance at a time when it was indebted to the vendee in a sum

largely in excess of the amount then due on the contract, the vendee having requested the appellant to apply it thereon. We must assume that the court found all controverted facts in favor of the respondents; that is, that the appellant owed the respondents \$2,200 at the time of the attempted rescission; that the respondents had, at the time of the execution of the contract, requested the appellant to apply it on the contract; and that it failed to furnish water for irrigation in 1906.

We think that the stipulations in the contract, as stated and set forth, make it as clear as written language can make it that the covenant to furnish water was an independent covenant, and that its breach did not militate against the forfeiture clause in the contract. At the time the notice of rescission was given, the respondents were in default on the payment of interest, taxes, and maintenance fee, and had made no improvements. These were made of the essence of the contract, and it was subject to cancellation for the breach of any one of them. The contract may seem harsh, but the courts cannot stand *in loco parentis* for adults who are mentally capable of contracting, nor can they relieve a party from the effect of a forfeiture for which he has expressly stipulated, where there is no fraud charged or proven. It seems proper to observe at this place that the respondent husband, at the time of the execution of the contract, was the appellant's vice president, and that he continued as such for the period of one year thereafter. By the terms of the contract the appellant became the owner of the improvements upon giving notice of default, so that it cannot be said that a failure to fence and cultivate was non-essential. Moreover, the maintenance fee was due on the first Monday in May, 1906, and the obligation to furnish water did not arise earlier than the 15th day of April. So there had been no substantial breach of that covenant, particularly in view of the fact that the ground had not been prepared to receive water. That the covenant to furnish

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water is an independent covenant is supported by: *Spokane Canal Co. v. Coffman*, 54 Wash. 645, 103 Pac. 1106; *Crampton v. McLaughlin Realty Co.*, 51 Wash. 525, 99 Pac. 586, 21 L. R. A. (N. S.) 823. The question is fully discussed in the case last cited, and the reasoning need not be repeated.

Where time is made the essence of a contract, equity will not decree specific performance at the suit of a vendee who is in default in making payments, there being nothing in the acts or the conduct of the vendor that amounts to acquiescence in the delay. *Kiefer v. Carter Contracting & Hauling Co.*, 59 Wash. 108, 109 Pac. 332; *Douglas v. Hanbury*, 56 Wash. 63, 104 Pac. 1110, 134 Am. St. 1096; *Sleeper v. Bragdon*, 45 Wash. 562, 88 Pac. 1036. The same principle applies to the failure of the vendee to make improvements which are made of the essence of the contract. *Boyes v. Green Mountain Falls Town & Imp. Co.*, 3 Colo. App. 295, 33 Pac. 77; *Enterprise Imp. Co. v. Wilson*, 11 Ky. Law 4, 11 S. W. 437.

It is argued that the right to rescind did not exist when the notice was given, because the notes had been indorsed as collateral. It was shown that they were withdrawn early in 1907, and that "they were subject to withdrawal at any time by the defendant." These facts take the case out of the rule announced in *Shaw v. Benesh*, 37 Wash. 457, 79 Pac. 1007. If they had not been withdrawn when the notice was given, the fact that they were subject to withdrawal at the option of the appellant shows that they were within its control. Moreover, when they were withdrawn and mailed to the respondents, the right to rescind, if theretofore in abeyance, was revived. *Douglas v. Blount*, 95 Tex. 369, 67 S. W. 484, 58 L. R. A. 699.

We will next consider the respondents' second position, viz., could the appellant rescind because of the failure of the respondent to keep his covenants, at a time when it was indebted to him in a sum in excess of all sums of money due upon the contract, he having requested it to apply the amount due

him upon the contract? Touching the request to make the application, the respondent husband testified:

"I told Mr. Loose [meaning the appellant's president] when I gave the check on December 8, that is really the time the contract was closed, I sold the property or had arranged with some parties in Portland to take hold of the property, and they delayed about it, and I finally told Mr. Loose I would make the payment, and if the thing did not go through with them I would take it myself and he would take the payments from the amounts due me on the books."

There is neither allegation nor proof that the appellant agreed to make the application. On the contrary, Mr. Loose testified that no such request was made and that the claim itself was always a disputed one. The contract provides that the purchase price should be paid in "lawful money." If the respondent desired or directed the application of the credit, why this provision? There is a two-fold answer to the respondents' position: First, the covenants to fence and improve the land had been broken, and second, the appellant did not agree to accept anything in payment except "lawful money." The covenants to fence and improve the property cannot be read out of the contract. It is the business of the court to construe a contract, not destroy or re-write it. The power to construe does not imply the power to destroy. In support of this contention, the respondents rely chiefly upon *Kennedy v. Davisson*, 46 W. Va. 433, 33 S. E. 291. In that case there had been a decree declaring certain debts to be liens upon Kennedy's land and directing a sale. Kennedy then brought a chancery suit against Davisson to set up certain set-offs against the debt which had been decreed against him and to enjoin the sale under the decree until such set-offs could be investigated and determined, and upon demurrer Kennedy's bill was dismissed. The court there said that "a set-off is a distinct demand, the subject of a cross-action, not a payment"; that "what was in its origin a set-off may by agreement become a payment," and that "here is a distinct

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agreement to apply the set-off, and 2 Story Eq. Jur., section 1435, says that 'if there be an express agreement to set off the debts against each other *pro tanto*, there could be no doubt that a court of equity would enforce specific performance of the agreement, although at law the party might be remediless.' " In *Doody v. Pierce*, 9 Allen 141, the plaintiff had made a mortgage to secure a payment of his note. The mortgagees agreed with the plaintiff that he should work for them and that they would apply his wages to the payment of the indebtedness. Before the principal became due, the plaintiff's wages exceeded the note and interest, but no indorsement had been made on the note and there had been no application of any part of the wages to its payment. The court said that the agreement to apply the wages upon the note was executory; that the condition of the mortgage had been broken, rendering the legal estate of the mortgagees absolute, and the plaintiff's estate an equitable right to redeem, and that his bill in equity to compel an application of his wages to the payment of the note and to obtain the legal title to the land was an appropriate remedy.

Cary v. Bancroft, 14 Pick. 315, 25 Am. Dec. 393, is to the same effect. In *Hughes v. Daniells*, 87 Mich. 190, 49 N. W. 542, it was held that a tender of past due paper of the creditor is not a tender of payment within the terms of the contract which stipulated for a cash payment. It is the general, if not the universal rule, that payment in anything other than money can only be made upon the distinct agreement of the creditor with the consent of the debtor to accept the thing as payment. *Borland v. Nevada Bank of San Francisco*, 99 Cal. 89, 33 Pac. 737, 37 Am. St. 32; *Taylor v. Lewis*, 146 Mass. 222, 15 N. E. 617.

There is another reason why the respondents cannot maintain this action; that is, that they acquiesced in the rescission. True, the respondent husband says that he informed Loose that he had no right to terminate the contract when the appellant was his debtor for more than enough to pay

the sums due. But on June 9, 1906, and again on the 11th, he wired Loose demanding payment of \$2,000 "to apply on account," and on June 12 he wrote confirming the telegrams and saying:

"I have had an account due me from the Columbia Canal Company for over a year and no apparent effort to settle same has been made. Kindly arrange this either by check or note at an early date."

In July, 1908, the respondent husband commenced an action against the appellant in the superior court of King county for the recovery of a money judgment on this claim. Mr. Loose testified the summons and complaint were "made by W. L. Benham," in July, 1908, and said that they were served upon the appellant, but that the suit was not prosecuted. The summons and complaint are signed by Jesse A. Frye, who the respondent husband testified had been his attorney in his attempt to settle this claim. The summons and complaint were admitted in evidence over the objection of respondents that they were "irrelevant, incompetent and immaterial and do not tend to prove any issue in the case." The respondents now urge that the signature of the respondent husband was not sufficiently identified. We think it was, in the absence of a specific objection raising that question. The fact of the commencement of the suit was not controverted by the respondents. We think the record evidence shows conclusively that the respondents at that time did not desire to have the account applied in payment of the contract, and that the retention of the notes, the demands for the payment of the account, and the commencement of the suit, point with a definiteness amounting almost to a demonstration to an acquiescence in the rescission. *Voight v. Fidelity Inv. Co.*, 49 Wash. 612, 96 Pac. 162; *Herpolsheimer v. Christopher*, 76 Neb. 352, 107 N. W. 382, 111 N. W. 359, 9 L. R. A. (N. S.) 1127; *Moran & Co. v. Palmer*, 36 Wash. 684, 79 Pac. 476. This view is given added weight by the fact that the respondents waited for nearly three years after

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receiving notice of the rescission before filing their bill, the property having in the meantime trebled in value.

The judgment is reversed, with directions to dismiss the action, the appellant to recover its costs.

CROW, C. J., CHADWICK, MOUNT, and PARKER, JJ., concur.

[No. 10847. Department One. June 13, 1913.]

THE STATE OF WASHINGTON, *Respondent*, v. CHARLES PRYOR,
Appellant.¹

ABORTION—ELEMENTS OF OFFENSE—STATUTES—CONSTRUCTION. In a prosecution for abortion under Rem. & Bal. Code, § 2448, defining the offense as the use of any instrument or other means with intent to produce a miscarriage, when the same was not necessary to preserve life, it is immaterial whether the instruments used and inserted were the right kind, or how far they penetrated, or whether they actually caused an abortion or not.

WITNESSES — CREDIBILITY — IMPEACHMENT. In a prosecution for abortion, in which the prosecutrix testified that the accused told her that he inserted instruments for the purpose of relieving her of the child, medical testimony that she was at the time suffering from hysteria, which caused delusions and hallucinations is admissible as affecting her credibility.

Appeal from a judgment of the superior court for King county, Ronald, J., entered July 3, 1912, upon a trial and conviction of abortion. Reversed.

A. G. McBride and *J. E. McGrew*, for appellant.

John F. Murphy and *H. B. Butler*, for respondent.

GOSE, J.—The defendant was convicted of the crime of abortion, and has appealed from the judgment entered upon the verdict of the jury. The statute, Rem. & Bal. Code, § 2448 (P. C. 135 § 391), provides that:

“Every person who, with intent thereby to produce the miscarriage of a woman, unless the same is necessary to pre-

¹Reported in 132 Pac. 874.

serve her life or that of the child whereof she is pregnant, shall . . . use, or cause to be used, any instrument or other means, shall be guilty of abortion,”

The information charges that the appellant, in King county, on the 6th day of September, 1911, with the intent to produce the miscarriage of Regna Abramson, did (omitting qualifying words) use a speculum and a rubber catheter, which instruments he then and there inserted into her private parts, such miscarriage not being necessary to preserve her life or the life of the child whereof she was then pregnant. This is a second appeal. See *State v. Pryor*, 67 Wash. 216, 121 Pac. 56.

The appellant challenges the sufficiency of the evidence to support the verdict. This point was pressed with much earnestness at the bar, the argument being that the instruments themselves, and the evidence of the medical experts, show that the instruments could not have been inserted in the uterus or cervical canal. The appellant admitted that the girl was pregnant by him, and that he used the instruments upon her, but says that he did so for a lawful purpose, namely, to treat excoriation “in the cervix of the uterus.” Touching this question, the court gave the jury the following instruction:

“In this case it has been admitted that Regna Abramson was pregnant and by the defendant, and that the defendant, on or about the date mentioned in the information, inserted in the private parts of said Regna Abramson the speculum and catheter introduced as exhibits in this case. The only question left for you to determine is, Were such instruments, or either one of them, used with intent thereby to produce a miscarriage, the same not being necessary to preserve either the life of Regna Abramson or of the child whereof she was pregnant? If either instrument when inserted was so inserted with that intent, then it makes no difference whether such was the right kind of an instrument, or how far in it penetrated—whether it actually entered the uterus or not, or actually caused an abortion or not—if it, whatever kind it be, and however or wherever it was inserted, was so inserted with

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intent thereby to cause an abortion, then you will find the defendant guilty."

The instruction is terse, lucid, and admittedly correct. The girl testified that the appellant told her that he inserted the instruments for the purpose of relieving her of the child. The state's medical witnesses say that the instruments could have been inserted into the uterus. This is denied by the medical experts offered by the appellant. Measured by the law as announced by the court, it is obvious without further comment that this assignment cannot be sustained.

The appellant sought to show by medical testimony that Regna Abramson, who testified for the state, while sane at the time she testified, was, at the time she charges the crime to have been committed, suffering from hysteria, which caused her to have "delusions, hallucinations . . . and illusions." The state's counsel objected on the ground that the testimony was irrelevant and immaterial. The court in sustaining the objection, among other things, said: "The man did insert that instrument or he did not with intent; he did or he did not, that is the whole question." The court was both right and wrong in this utterance; right so far as he stated the fact at issue, and wrong in so far as he reached the conclusion that the testimony was inadmissible. The appellant used the instruments either for the purpose of committing an abortion or for a lawful purpose, namely, that of medically treating the uterus. The evidence offered and rejected was admissible upon the question of the credibility of the girl's testimony. It touched the very heart of the case, namely, was there a criminal intent? It was competent for the same reason that testimony tending to show her intoxication at the time of the occurrence would have been competent. 1 Wharton & Stille, Medical Jurisprudence (4th ed.), § 518; 40 Cyc. 2573; 2 Elliott, Evidence, § 756; Wharton, Criminal Evidence (10th ed.), § 370a; 2 Bishop, New Criminal Procedure (2d ed.), § 1142; *Holcomb v. Holcomb*, 28 Conn.

177; *Sarbach v. Jones*, 20 Kan. 497; *Dejarnette v. Commonwealth*, 75 Va. 867.

Wharton & Stille, *Medical Jurisprudence* (4th ed.), § 518, thus states the rule:

“On the other hand, Morel calls attention to the well-substantiated fact that patients of these classes [sufferers from hysteria] sometimes tenaciously cherish delusions and hallucinations that they have been the subject of sexual wrongs from others (*e. g.*, rape, abortion, impregnation); and detail the circumstances of such wrongs with a consistency and exactness which, in those unacquainted with the patient’s condition, secure belief.”

“Delusions and hallucinations constitute that species of mental unsoundness which is marked by persistent and incorrigible beliefs that things which exist only in the imagination of the patient are real.” 16 Am. & Eng. Ency. Law (2d ed.), p. 563.

In considering this question in the *Holcomb* case, the court said:

“The inlets to the understanding may be perfect, so far as any human eye can discern, the moral qualities may all be healthy and active, the conscience may be sensitive and vigilant, and the memory may be able to perform its office faithfully, and yet, under the influence of morbid delusions, reason becomes dethroned, false impressions from surrounding objects are received, and the mind becomes an unsafe depository of facts. The force of all human testimony depends as much upon the ability of the witness to observe the facts correctly as upon his disposition to describe them honestly, and if the mind of the witness is in such a condition that it cannot accurately observe passing events, and if erroneous impressions are thereby made upon the tablet of the memory, his story will make but a feeble impression upon the hearer, though it be told with the greatest apparent sincerity. We are therefore of opinion that the insanity of a witness at the time of the transaction about which he is called to testify, does impair the force of his testimony, and is a matter proper to be considered by the triers to whom his testimony is submitted; and if this matter is to be considered by the triers,

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we do not perceive any reason why it should not be treated like any other fact."

In the *Dejarnette* case, it is said:

"In all inquiries relating to insanity, every reasonable latitude should be allowed in the examination of witnesses, however false or unfounded the court may consider the defense."

The state relies upon the case of *State v. Hayward*, 62 Minn. 474, 65 N. W. 63. In that case the court remarked that the temporary aberrations or delusions sought to be proven were remote in point of time, and were not of the same type or character as the delusions claimed to have existed in the mind of the witness at the time of the occurrence to which the witness testified. In other respects it differs so widely in its facts from this case that a discussion of it would not be profitable.

The judgment is reversed, with directions to grant a new trial.

CROW, C. J., FULLERTON, MOUNT, and PARKER, JJ., concur.

[No. 11163. Department One. June 13, 1913.]

THE STATE OF WASHINGTON, *Respondent*, v. J. T. TRIBETT,
Appellant.¹

HOMICIDE—SELF-DEFENSE—EVIDENCE—ADMISSIBILITY — CORROBORATION. Where defendant, a street car conductor, claimed self-defense in a killing by shooting in the nighttime at an isolated location at the end of the car line, and had testified that the father of the deceased started to get off the car at a certain place, calling to his son, but after consultation between them and threats to "get him" at the end of the line, they rode past their destination and attacked him instead of leaving the car when the end of the line was called, the defendant should be allowed to show that passengers for their destination usually left the car where the father started to get off, as it

¹Reported in 132 Pac. 875.

tended to corroborate him and show their motive in remaining on the car; also, the reputation of the line for lawlessness, his knowledge thereof, and the isolation of the place, as tending to show whether he acted as a reasonably prudent man in defending himself.

HOMICIDE—DEFENSES—DEFENSE OF SON—INSTRUCTIONS. In a trial for the killing of a father and son, in which the defense claimed that the son was the aggressor, an instruction that the father had a right to come to the defense of his son if, seeing him assaulted, he believed him in danger of great personal injury, should have been qualified by an instruction that, if the son was himself the aggressor, the right to come to his defense remained in abeyance until the son had in good faith attempted to withdraw from the conflict which he had brought on; and failure to make the qualification, where there is no other instruction upon the right of the father to come to the defense of the son, is not cured by other correct instructions on the question of self-defense.

Appeal from a judgment of the superior court for King county, Ronald, J., entered December 7, 1912, upon a trial and conviction of murder. Reversed.

George H. Rummens (*Walter S. Fulton* and *Robert L. Blewett*, of counsel), for appellant.

John F. Murphy and *H. B. Butler*, for respondent.

Gose, J.—The appellant was convicted of the crime of murder in the second degree, for shooting and killing one Oliver Sanford, and sentenced to serve a term of from ten years to life in the state penitentiary. At the time of the homicide, the appellant was in the employ of the Puget Sound Traction, Light & Power Company as a street car conductor, in the city of Seattle. He had been so employed for about two years. The killing occurred on the rear platform of the car, a "pay-as-you-enter" car, at the end of the "Ballard Beach line," between 9:30 and 10 o'clock in the nighttime on the 31st day of August, 1912. The appellant had then been a conductor on that line for about four months. This line extends from the business part of the city through and to the limits of what was formerly the city of Ballard. In the course of the outward trip, Otis Sanford, a son of the de-

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ceased, charged the appellant with passing people who desired to take the car. The appellant testified that he answered that he did not see them; that the young man replied that he ought to be reported; that he in turn said, "Here is my number; report me"; that the young man answered, "No, I rather beat your head off"; that he then turned away; that soon thereafter the young man said, "If you ever do me that way I will pull you off this car and beat your head off"; that he said, "All right," and again turned; that the young man then said, "I will go to the end of the line right now with you and pull you off this car and beat your head off"; that he replied, "All right"; that the young man was then leaning against the post at the entrance gate; that when the car reached 32d avenue N. W. and 59th street, the deceased came out of the car and said to his son, "Ain't you going to get off here?" that the son answered, "No, I am going to the end of the line to get this fellow," indicating the appellant; that the appellant then opened the gates and several passengers alighted; that the deceased and his son then stood on the rear platform near the appellant, whispering to each other; that he heard the deceased say to his son, "All right, we will go to the end of the line and get him;" that when the car reached the end of the line, the appellant called, "This is the end of the line"; that he then said to the young man, "End of the line; going off?" that all of the passengers then left the car except the deceased and his son, and that after waiting fifteen or twenty seconds he signaled for the car to proceed; that it then passed onto the Y in order to turn for the return trip to the city; that while upon the Y the deceased and his son advanced simultaneously toward him in a threatening manner, deceased with an uplifted bottle in his hand; that the young man drew back his coat as he came toward him; "I thought he was going for a gun;" that he—the appellant—jumped backward, drew his pistol from the inside coat pocket, fired two shots in rapid succession, first at the young man, and then at the deceased, while they were both

advancing upon him. The young man fell dead upon the rear platform of the car at the entrance gate, and the deceased stepped off and to the rear of the car, where he sat down or lay down, and shortly expired.

The appellant further testified that passengers were not allowed to ride upon the Y. The motorman testified that, immediately after the tragedy, the appellant said, "They came out here to beat me up, and when they attacked him he shot them." Other witnesses gave similar testimony. Another witness, a passenger upon the cars, testified that he heard the young man say to the appellant, "We will get even with you." Roy Sanford, a son of Oliver and a brother of Otis, a witness for the state, testified that he had an engagement for a launch ride with his father, mother, brother and the rest of the family "just as soon as I could get there"; that his launch was at "Carlson's boathouse," near where the canal locks were being constructed; that he was working at a store at Queen Anne and Mercer streets in the city; that he left the store about 9:30 on the evening of the tragedy, and went direct to Ballard to meet his engagement, and that he heard of the tragedy when he had arrived at the boathouse. He further testified that there were two ways of going to the boathouse, one from 32d avenue N. W. and 59th street, the other from the end of the line, and that his father and brother were more familiar with that vicinity than he was. There was other testimony tending to show that the shortest route to the boathouse was from 32d avenue and 59th street. The appellant then sought to prove, by a motorman who had worked one year on the Ballard Beach line, the place where people usually left the car to go to the canal locks. Upon the objection of the state's attorney, this line of evidence was rejected, and the appellant's counsel was warned by the court to pursue the inquiry no further as the evidence was not competent. The exclusion of this evidence is assigned as error. This witness was then asked to state if he knew the general reputation of the Ballard Beach line as to whether it was a

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peaceable line or otherwise. An objection of state's counsel that the question was "incompetent, irrelevant and immaterial" was sustained. The appellant's counsel thereupon announced: "I will now make an offer on that question" in the absence of the jury, to which the court said: "The record shows your offer as plainly as it can." Error is also assigned to the exclusion of this evidence.

These assignments may best be considered together. The appellant admitted the killing and sought to exonerate himself from criminal culpability by pleading self-defense. The state's evidence shows that both father and son had an engagement with a son and brother for a launch ride the evening of the tragedy. The appellant testified that, when the car was approaching 32d avenue and 59th street, the father, whom he had not before observed, passed out of the body of the car to the rear platform, as if to alight at that point, and that he said to the son, "Ain't you going to get off here?" to which the son answered, "No, I am going to the end of the line to get this fellow," indicating the appellant, and that after a conversation between the two, carried on in a whisper, he heard the father make a like remark. As corroborative of this testimony the appellant was entitled to show, if he could, that 32d avenue and 59th street was the place where passengers going to the boathouse or the canal locks usually left the car. If the destination of the father and son was the boathouse, as the state's testimony tended to prove, and 32d avenue and 59th street was the usual and customary place for persons to alight going to that point, the testimony rejected was competent and material, in that it tended both to corroborate the appellant and to shed light upon the motive of the deceased and his son in remaining upon the car. *Robertson v. O'Neill*, 67 Wash. 121, 120 Pac. 884.

So it was with the offer to prove the reputation of the line upon which the tragedy occurred. If it had a reputation for lawlessness and the appellant knew it, facts which he had

a right to show, it is reasonable to presume that the threats and conduct of the father and the son would have given him greater apprehension than if its reputation had been good. The appellant had a right to act as a reasonably prudent man similarly situated would have acted. In short, he had a right to act upon all he knew—the threats of the parties, their failure to leave the car at a point where their conduct indicated they had intended to leave, the reputation of the line for lawlessness, his knowledge of that fact if he had such knowledge, the hour of the night, the darkness, the isolation at the end of the line, the failure of the parties to leave the car at the end of the line, and the circumstance that they remained upon the car while it passed on the Y in order to reverse and return to the city. All of these facts and circumstances should have been placed before the jury, to the end that they could put themselves in the place of the appellant, get the point of view which he had at the time of the tragedy, and view the conduct of the father and the son with all its pertinent sidelights as the appellant was warranted in viewing it. In no other way could the jury safely say what a reasonably prudent man similarly situated would have done. As the learned trial court correctly instructed the jury:

“Actual or positive danger is not indispensable to justify self-defense. Men when threatened with danger are obliged to judge from appearances and to determine therefrom in the light of all the circumstances the actual state of the surroundings, and in such cases if they act upon reasonable and honest convictions, induced by reasonable evidence under all the circumstances, they will not be held responsible criminally for a mistake as to the extent of the actual danger.”

See, also, *State v. Claire*, 41 La. Ann. 191, 6 South. 129.

The court instructed:

“The same condition which will authorize a man to act in defense of himself will authorize him to act in defense of his son. If the father, seeing his son assaulted or menaced with great danger to life, under circumstances such as are cal-

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culated to create in the mind of the father a well-grounded belief that the son is in danger of some great personal injury, then such father, if he actually and in good faith believes the life of such son to be in danger, has a right to use such force as may at the time under all the circumstances reasonably seem necessary to prevent the threatened danger to his son."

This instruction should have been qualified by an instruction that, if the son was himself the aggressor, then the right of the father to act in his defense remained in abeyance until the son had in good faith attempted to withdraw from the conflict which he had brought on. This qualification springs from the principle that one who is himself the aggressor may not invoke the law of self-defense until he has in good faith attempted to withdraw from the combat, and one who goes to the defense of another stands in the shoes of him he seeks to defend. 21 Cyc. 827; *People v. Travis*, 56 Cal. 251; *Smurr v. State*, 105 Ind. 125, 4 N. E. 445. The instruction was wrong, and being the only instruction upon the right of the father to go to the defense of the son, we do not think it was rendered harmless by other correct instructions upon the question of self-defense.

The appellant suggests that the verdict is contrary to the evidence. One of the state's witnesses testified that the young man said to appellant, "I will get on some other night and drag you off and beat you up"; that the appellant answered in substance, "If you want to beat me up, come to the end of the car line," and the young man replied, "All right, you are on; I will be out there." This, with the admitted killing and other circumstances not necessary to set forth, made a case for the jury.

The judgment is reversed.

CROW, C. J., MOUNT, FULLERTON, and PARKER, JJ., concur.

[No. 11092. Department Two. June 13, 1913.]

In re TWELFTH AVENUE SOUTH.

YESLER LOGGING COMPANY, *Respondent*, v. SEATTLE
ELECTRIC COMPANY, *Appellant*.¹

EMINENT DOMAIN — COMPENSATION — PERSONS ENTITLED—CONVEY-
ANCE PENDING PROCEEDINGS. A warranty deed without reservation
of lands damaged by a pending condemnation, after the verdict for
damages but prior to entry of judgment or payment of the award or
the damaging of the property, entitles the grantee to the compensa-
tion awarded, in view of the fact that under Const., art. 1, § 16, and
Rem. & Bal. Code, §§ 7783, 7784, and 7816, the condemnation is not
completed or the award an enforceable demand until the entry of the
last judgment and expiration of the statutory period for abandon-
ment of the proceedings or waiver thereof.

Appeal from a judgment of the superior court for King
county, Tallman, J., entered November 30, 1912, denying an
application for substitution in a condemnation judgment,
and awarding the ownership of money paid into court. Re-
versed.

James B. Howe, and *Hugh A. Tait*, for appellant.

James B. Murphy, for respondent.

ELLIS, J.—This case presents a contest between the owner
of land at the date of a verdict, and the owner at the date of
the final judgment, in condemnation, as to which shall receive
the money paid into court in compensation for the right to
damage the land by a regrade of certain streets by the city
of Seattle. At the date of the condemnation proceedings
by the city, and at the date of the verdict assessing the dam-
ages, the Yesler Logging Company was the owner of the
land. Prior to the entry of the judgment upon the verdict,
and prior to the payment of the compensation awarded into
the registry of the court, and prior to the date of doing the
damage to the property for which compensation was paid

¹Reported in 132 Pac. 868.

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into court, that company sold and conveyed the land by warranty deed, describing the land by metes and bounds, "together with the appurtenances," and without any reservation, to the Seattle Electric Company. After these things had been done, the latter company, claiming the right to the money as owner of the land, applied to be substituted in place of the Yesler Logging Company in the judgment of condemnation. The court, holding the logging company entitled to the money, denied the application. The Seattle Electric Company appealed.

Under these admitted facts, appellant contends, and we think justly, that it is entitled to the compensation paid into court for the privilege of damaging the land. In the absence of any reservation in the deed of conveyance to the contrary, or of facts showing estoppel or other contravening equity, such as payment of a less price by reason of the pending condemnation proceeding, the person owning the land at the time the right to take or damage it became irrevocable in the city should be entitled to the compensation for such damage. Prior to that time, both the right to take or damage and the obligation to pay for that right are inchoate, uncertain and contingent, and may never mature. An abandonment of the condemnation by the city would defeat the one and abort the other. Where the conveyance of the land pending condemnation is by deed without reservation, the only certain and just rule is that the money to be paid for the right to take or damage the property shall be paid to the person or persons owning the property or having an interest therein at the time when the condemnation has reached that point of completion where it is not subject to abandonment, and when the right to the compensation becomes an enforceable demand against the condemner. This is the necessary result of the decision in *North Coast R. Co. v. Gentry*, 73 Wash. 188, 131 Pac. 856, where we held that the title passed by the condemnation when the condemner had estopped itself from abandoning the condemnation. The

inquiry is thus reduced to the simple question, When did the right to damage and the correlative obligation to pay become fixed and irrevocable? The statute conferring the right upon and governing the exercise of the power of eminent domain by cities, so far as here material, provides:

“Any final judgment or judgments rendered by said court upon any finding or findings of any jury or juries, or upon any finding or findings of the court in case a jury be waived, shall be lawful and sufficient condemnation of the land or property to be taken, or of the right to damage the same in the manner proposed, upon the payment of the amount of such findings . . .” Rem. & Bal. Code, § 7783 (P. C. 171 § 61).

“The court, upon proof that just compensation so found by the jury, or by the court in case the jury is waived, together with costs, has been paid to the person entitled thereto, or has been paid into court as directed by the court, shall enter an order that the city or town shall have the right at any time thereafter to take possession of or damage the property in respect to which such compensation shall have been so paid or paid into court as aforesaid, and thereupon, the title to any property so taken shall be vested in fee simple in such city or town.” Rem. & Bal. Code, § 7784 (P. C. 171 § 63).

“At any time within two months from the date of rendition of the last judgment awarding compensation for any such improvement in the superior court, or if any appeal be taken, then within two months after the final determination of the appeal in the supreme court, any such city may discontinue the proceedings by ordinance passed for that purpose before making payment or proceeding with the improvement by paying or depositing in court all taxable costs incurred by any parties to the proceedings up to the time of such discontinuance. . . .” Rem. & Bal. Code, § 7816 (P. C. 171 § 127).

The state constitution, art. 1, § 16, contains the following: “No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner . . .” These

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statutory provisions, construed in connection with the constitutional requirement, make it plain that, prior to the entry of the judgment and the payment into court, the city acquires no right to take or damage the land, and that the owner acquires no right to compensation until the expiration of sixty days after the entry of judgment, unless the compensation be sooner paid into court. The owner is not divested of his title, nor can his property be lawfully damaged until compensation is made or paid into court. The proceeding is *in rem*, and the property is not condemned until the entry of the last judgment therein and the expiration of the statutory period accorded for abandonment or a waiver of the right of abandonment by an earlier payment. Until then the owner has acquired no vested, personal right to enforce payment. 2 Lewis, Eminent Domain (3d ed.), p. 1561, § 895. Until then neither he nor his property has sustained damage. Then, and not till then, the title to the property or the right to damage it passes to the city, and the title to the money passes to the owner, unless he appeals. *Spokane v. Cowles*, 67 Wash. 539, 121 Pac. 463; *State ex rel. Murray v. Herdlick*, 73 Wash. 301, 131 Pac. 1139; *State ex rel. Donofrio v. Humes*, 34 Wash. 347, 75 Pac. 348; *Silverstone v. Harn*, 66 Wash. 440, 120 Pac. 109. The courts of Illinois, under a statute similar to ours in essential particulars, has construed the rights of the condemner and the condemnee as to the land, and also the rights of grantor and grantee as to the money paid for the taking or damaging of property, in accordance with the view which we herein express.

“A conveyance by one having the title when the judgment of condemnation is entered, and before possession is taken or payment is made, passes the property subject to the right of the petitioner for condemnation to acquire the same upon payment of the amount of the judgment. (*Price v. Engelking*, 58 Ill. App. 547). And it is true, as a general thing, that the grantee from the person, holding the title when the judgment of condemnation is entered, is entitled to the compensation when the compensation is paid. In other words, the

one who is entitled to receive the award of damages is the person who is owner when the possession is taken, or the payment of the damages is made." *Chandler v. Morey*, 195 Ill. 596, 63 N. E. 512.

The fact that in the case quoted there was a specific reservation of the condemnation award, taking the case out of the general rule, merely exemplifies that rule as we have stated it. See, also, *Chicago v. Barbican*, 80 Ill. 482; *Price v. Engelking*, 58 Ill. App. 547; *Schreiber v. Chicago & E. R. Co.*, 115 Ill. 340, 3 N. E. 427.

"In general where property is conveyed during condemnation proceedings and before possession is taken, the person entitled to the compensation is the one who owns the premises when possession is actually taken. Thus the vendee is entitled to the damages where the land is conveyed to him after the award but before there has been a final confirmation." 15 Cyc. 797.

See, also, *Howley v. Pittsburg*, 204 Pa. St. 428, 54 Atl. 347; *Meginnis v. Nunamaker*, 64 Pa. St. 374; *Carli v. Stillwater & St. Paul R. Co.*, 16 Minn. 260; *Magee v. Brooklyn*, 144 N. Y. 265, 39 N. E. 87; *In re Hamilton Street*, 144 App. Div. 702, 129 N. Y. Supp. 317; *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1; *Virginia-Carolina R. Co. v. Booker*, 99 Va. 633, 39 N. E. 591; *Obst v. Covell*, 93 Minn. 30, 100 N. W. 650; *Clark v. Meyerdirck*, 107 Md. 63, 68 Atl. 141; *Kiebler v. Holmes*, 58 Mo. App. 119.

There is no controlling significance in the fact that the judgment when entered carries interest from the date of the verdict, as held in *North Coast R. Co. v. Aumiller*, 61 Wash. 271, 112 Pac. 384, and *State ex rel. Donofrio v. Humes*, *supra*. This arises merely from the fact that of necessity the damages are assessed as of the date of the trial. That, however, can make no possible difference in relation to the question here presented, since the proceeding is one *in rem*. No right to the money, either principal or interest, attaches until the title to the land or the right to damage it passes by

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payment or by the expiration of the period accorded for abandonment.

Our holding in *In re Seattle*, 26 Wash. 602, 67 Pac. 250, does not militate against the views here expressed. In that case the damage had actually been done by a physical change of the street grade before the title passed to the mortgagee by foreclosure and sale. He purchased the land in its damaged condition for the full mortgage debt. His claim was thus satisfied in full. He, therefore, had no right to compensation for damage to the property which had been actually accomplished before he acquired it. The fact that the condemnation to assess this damage which had already accrued, and compensation for which had already become a vested right, was completed subsequent to the foreclosure sale, did not divest the mortgagor's personal claim which had attached and become a mature obligation against the city prior to that sale. The right to the damages having already accrued as a personal right could not pass as appurtenant to the land, but only by an assignment. *Chicago v. Barbican, supra*; *In re Hamilton Street, supra*; *Turner v. Missouri Pac. R. Co.*, 130 Mo. App. 535, 109 S. W. 101; *Smith v. Nashville & K. R. Co.*, 88 Tenn. 611, 13 S. W. 128; *Chicago, B. & Q. R. Co. v. Englehart*, 57 Neb. 444, 77 N. W. 1092.

The respondent, so far as the record shows, having received from the appellant full consideration for the property in its undamaged condition, having conveyed it with the appurtenances to the appellant by warranty deed without reservation, and the right to damage the land having been acquired by the city after this conveyance, and the damage having been actually inflicted by the city while the appellant was the owner, the appellant, under a statute such as ours, is both on reason and authority entitled to the compensation. We have been cited to no authority arising under a statute similar to ours holding to the contrary.

The judgment is reversed, and the cause is remanded with direction to substitute the appellant for the respondent in

the judgment of condemnation, and to award to the appellant the money paid into the registry of the court for the right to damage this property.

CROW, C. J., MAIN, FULLERTON, and MORRIS, JJ., concur.

[No. 11172. Department Two. June 13, 1913.]

JOHN L. DAMON, *Respondent*, v. JOHN E. RYAN *et al.*,
Appellants.¹

EMINENT DOMAIN—COMPENSATION — PERSONS ENTITLED—LOSS OF TITLE PENDING PROCEEDINGS. The purchaser at execution sale of lands damaged by a pending condemnation, after verdict but prior to entry of judgment, is entitled to the compensation in view of the fact that the condemnation is not completed or the award an enforceable demand until the entry of the last judgment and the expiration of the statutory period for abandonment of the proceedings or waiver thereof; since the purchaser at judicial sale is regarded as the owner from the day of sale, where he afterwards received his sheriff's deed.

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 22, 1913, in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to determine title to an award in condemnation proceedings. Reversed.

Grover E. Desmond and *Clise & Poe*, for appellants.

James A. Snoddy, for respondent.

ELLIS, J.—This is an action to determine the right to money paid into the registry of the court by the city of Seattle for the right to damage certain lots by a regrade of the streets upon which they abut. Prior to January 5, 1911, the plaintiff was the owner of an undivided one-half of the lots in question as his separate property. On that date his wife, Lillie A. Damon, procured a decree of divorce and a

¹Reported in 132 Pac. 871.

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judgment for \$7,500 alimony against him. The decree made this sum payable in installments, declared it a lien upon his interest in these lots, and provided that, on his failure to meet any installment when due, the whole sum should become due and enforceable. He failed to make payment of alimony, and on April 12, 1911, execution therefor was levied upon this property. The plaintiff's interest in these lots was, at the sale on execution, purchased by Lillie A. Damon, to whom a certificate of purchase issued on May 27, 1911, in full satisfaction of her claim for alimony. On June 30, 1911, she assigned an undivided one-half interest in this certificate to the defendant John E. Ryan. Plaintiff failing to redeem, a sheriff's deed was issued to the defendants Lillie A. Damon and John E. Ryan, conveying an undivided one-half interest in the lots. Prior to the divorce decree, the city had instituted condemnation proceedings to acquire the right to damage this property by regrading certain adjacent streets. The verdict awarding \$1,247.80 for this right was entered in the condemnation suit on May 25, 1911, just two days prior to the issuance of the certificate of purchase on the execution sale to Mrs. Damon. On July 25, 1911, a formal judgment of condemnation on the verdict was signed by the court, filed and entered in the condemnation proceeding, and the amount of the award paid by the city into the registry of the court. The trial court held that the plaintiff, John L. Damon, was entitled to this money. The defendants, John E. Ryan and wife, have appealed.

Our decision in the recent case in *In re Twelfth Avenue South*, ante p. 132, 132 Pac. 868, is decisive of this case. We there said:

"Where the conveyance of the land pending condemnation is by deed, without reservation, the only certain and just rule is that the money to be paid for the right to take or damage the property shall be paid to the person or persons owning the property or having an interest therein at the time when the condemnation has reached that point of completion where it is not subject to abandonment and when the right to the

compensation becomes an enforceable demand against the condemner."

As there pointed out, that stage is reached only at the expiration of sixty days from the entry of the last judgment in the condemnation proceeding, unless compensation be sooner paid into court. *North Coast R. Co. v. Gentry*, 73 Wash. 188, 131 Pac. 856; *Spokane v. Cowles*, 67 Wash. 539, 121 Pac. 463; *State ex rel. Murray v. Herdlick*, 73 Wash. 301, 131 Pac. 1139; *State ex rel. Donofrio v. Humes*, 34 Wash. 347, 75 Pac. 348; *Silverstone v. Harn*, 66 Wash. 440, 120 Pac. 109; *Price v. Engelking*, 58 Ill. App. 547; *Chandler v. Morey*, 195 Ill. 596, 63 N. E. 512; *Chicago v. Barbican*, 80 Ill. 482; *Schreiber v. Chicago & E. R. Co.*, 115 Ill. 340, 3 N. E. 427; *Meginnis v. Nunamaker*, 64 Pa. St. 374; *Howley v. Pittsburg*, 204 Pa. St. 428, 54 Atl. 347; *Carli v. Stillwater & St. Paul R. Co.*, 16 Minn. 260; *Magee v. Brooklyn*, 144 N. Y. 265, 39 N. E. 87; *In re Hamilton Street*, 144 App. Div. 702, 129 N. Y. Supp. 317; *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1; *Virginia-Carolina R. Co. v. Booker*, 99 Va. 633, 39 S. E. 591; *Obst v. Covell*, 93 Minn. 30, 100 N. W. 650; *Kiebler v. Holmes*, 58 Mo. App. 119; *Clark v. Meyerdirck*, 107 Md. 63, 68 Atl. 141; *In re Baird*, 22 N. Y. Supp. 1021.

While the point is not material, in view of our conclusion, we hold that the clerk's entry of judgment in his minutes on the verdict is not the final judgment. It is lacking in many of the elements of a final judgment of appropriation. The facts in *Wagner v. Northern Life Ins. Co.*, 70 Wash. 210, 126 Pac. 434, are wide of a parallel.

It is manifest that, if the city had abandoned the condemnation proceedings within the sixty days after judgment, Mrs. Damon and the appellants would have taken the property *undamaged*. When the money was paid into court, the right to damage the property for the first time attached, and the right to the compensation for the first time became a vested, personal right. The proceeding for condemnation

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being *in rem*, the right to the compensation vested in the then owner of the property. No assignment of this claim was necessary or proper, since no personal right had prior to that time arisen. 2 Lewis, Eminent Domain (3d ed.), § 895. As indicated in the opinion in *In re Twelfth Avenue, supra*, the decision in *In re Seattle*, 26 Wash. 602, 67 Pac. 250, does not militate against the view here expressed. There the property had been physically damaged by an actual performance of the work of changing the street grade prior to any suit for condemnation, and prior to the purchase of the property at the foreclosure sale by the mortgagee. The right to damages for the change of grade had already vested in the mortgagor as a personal right by the actual damaging of the property while it was his. The mortgagee bid in the property *in its damaged condition* in full satisfaction of his mortgage debt. The distinction from the case before us is plain.

“A purchaser at judicial sale before the property is taken, who receives a deed afterwards, is to be regarded as owner from the day of sale and is entitled to the compensation.” 2 Lewis, Eminent Domain (3d ed.), § 895.

The appellants are clearly entitled to one-half of the award for damaging these lots.

The judgment, so far as it relates to the sum of \$311.82 claimed by the appellants John E. Ryan and wife, is reversed, and the cause is remanded with direction to modify the judgment in accordance with this opinion. The appellants may recover their costs.

CROW, C. J., MAIN, FULLERTON, and MORRIS, JJ., concur.

[No. 10729. Department One. June 13, 1913.]

**H. E. WILEY *et al.*, Appellants, v. JOHN B. HART *et al.*,
Respondents.¹**

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence will not be disturbed on appeal, where it cannot be said that the trial court, hearing and seeing a large number of witnesses, did not fairly measure the evidence.

CONTRACTS — BUILDING CONTRACTS—EXTRAS — WRITTEN ORDERS OF ARCHITECT—NECESSITY. The owners are not liable for extras orally agreed to by the architect, acting as the owners' agent, where the owners did not agree to or have any knowledge thereof, and the building contract provided that no alterations should be made except upon a written order of the architect.

CONTRACTS — BUILDING CONTRACTS — DEMURRAGE — IMPRACTICABLE APPORTIONMENT OF DAMAGES. Nothing can be allowed under a demurrage clause in a building contract for failure to complete the building on time, where it appears that, while the contractors were dilatory, a considerable portion of the delay was due to the acts of the architect, as agent of the owners, and also to the fault of the owners in not completing the building sooner after taking possession, making it impracticable to apportion the damages.

INDEMNITY—BUILDING CONTRACTS—LIENS—ATTORNEY'S FEES—DAMAGES—MITIGATION. The owners of a building, seeking recovery from the contractors' surety for their default in performance, are not obliged to settle with lien claimants before judgment foreclosing the liens, in order to mitigate damages by saving attorney's fees in the foreclosures, where they used due diligence to ascertain the just amount of the claims without obtaining such information as would justify their payment before judgment.

PRINCIPAL AND SURETY—DISCHARGE OF SURETY—ALTERATIONS—CONSENT. A surety company guaranteeing the performance of a building contract is not relieved from liability by reason of material changes in the contract, where it had notice of the changes and consented thereto; especially where the only damages allowed were those resulting from liens and defective construction.

COSTS—ON APPEAL—DISCRETION. Where there are cross-appeals, and both sides are in a measure successful, costs on appeal are discretionary under Rem. & Bal. Code, § 1744, and may not be allowed to either party.

¹Reported in 132 Pac. 1015.

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Cross-appeals from a judgment of the superior court for King county, Tallman, J., entered January 5, 1912, in favor of the defendants, in consolidated actions to foreclose a mechanics' lien, and for damages for breach of contract, after a trial on the merits before the court. Modified.

Bevington & Chambers, Roberts, Battle, Hulbert & Tenant, and John W. Roberts, for appellants.

William Parmelee and John B. Hart, for respondents.

PARKER, J.—The controversy involved in this appeal is between Wiley & Bevington, copartners, building contractors, the German-American Bank of Seattle, their assignee, and the National Surety Company, on the one side, and John B. Hart and wife, the owners of a building under contract for construction by Wiley & Bevington, on the other side. There are involved claims of the contractors against the owners for the balance of the contract price, and a large number of items for extra work and material claimed to have been put into the building by them during its construction at the instance of the architect; and, also, claims of the owners against the contractors for damages resulting from alleged defective construction of the building, and from failure of the contractors to finish the building within the time specified by the contract.

In March, 1911, the Dungeness Logging Company commenced an action in the superior court for King county against the owners, seeking foreclosure of a lien upon the building, and for material claimed to have been furnished for its construction. In July, 1911, the German-American Bank of Seattle, as assignee of the contractors for the balance claimed to be due them for the construction of the building, intervened in that action, seeking recovery of that balance from the owners and foreclosure of a lien claimed upon the building to secure the same, and also seeking to have brought into that action numerous other lien claimants and have their several claims adjusted therein. Thereafter, these several lien claimants filed their answers and cross-complaints in that

action, setting up their several claims of lien and praying foreclosure thereof. On August 1, 1911, the owners commenced an action in the superior court for King county against the contractors and the surety company, seeking recovery of damages claimed as a result of defective construction of the building and failure to complete the building within the time specified in the contract, and making the German-American Bank and the lien claimants defendants in that action, to the end that their respective rights should be adjudicated therein. On August 3, 1911, the owners answered the complaint in intervention of the German-American Bank in the Dungeness Logging Company case, setting up in defense of the claims of the bank, as assignee of the contractors, in substance the same claims for damages as in the action against the contractors and the surety company two days previous, and also praying that the two actions be consolidated.

The action was manifestly commenced by the owners against the contractors and the surety company to recover an affirmative judgment for damages against them, in view of the fact that they could not be forced into the Dungeness Logging Company lien case for that purpose. This was at least true as to the surety company. The contractors and the surety company answered in the action commenced against them by the owners, and thereafter, on September 9, 1911, an order was entered consolidating the two actions. Thereafter, on November 7, 1911, the consolidated cases proceeded to trial before the court without a jury. The trial continued for several weeks, during which oral testimony was introduced occupying in this record over 4,000 typewritten pages. There were also exhibits introduced, and now in the record before us, numbering some 500 separate documents. Nearly all of this testimony and these documents relate to the controversy between the contractors, the bank and the surety company on the one side, and the owners on the other; there be-

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ing but little evidence required to establish the claims of the several lien claimants.

On January 5, 1912, the superior court rendered its decree, establishing the several lien claims of laborers and materialmen who had filed their answers and cross-complaints in the Dungeness Logging Company case, decreeing foreclosure thereof against the building, allowing certain portions of claims for extras made by the contractors against the owners, allowing certain portions of claims for damages made by the owners against the contractors, including damages resulting from defective construction, for failure to complete the building within the time agreed upon, and from liens established against the building; and adjudging that the owners, John B. Hart and wife, recover from the contractors, Wiley & Bevington, and the National Surety Company, their surety, the sum of \$8,073.05, which sum the court concluded was the balance due to the owners on account of their damages sustained, after deducting the amount the contractors were entitled to credit for upon the original contract and for extra work and material put into the building by them. Thereupon the contractors, Wiley & Bevington, the German-American Bank, their assignee, the National Surety Company, their surety, and the owners, John B. Hart and wife, all appealed from this disposition of the cause.

We will now notice some of the principal facts touching more directly the differences between these appellants, here involved. On October 17, 1910, John B. Hart entered into a contract with Wiley & Bevington, by which they agreed to construct an apartment building in Seattle upon a lot, the community property of Hart and wife, for the agreed price of \$38,550, they to furnish all labor and material and construct the building "under the direction and to the satisfaction of H. Ryan, architect, acting for the purposes of this contract as agent for the owner," and according to plans and specifications prepared by him therefor. It was agreed in this contract that the building should be completed on or before

February 20, 1911, and that "should the contractor fail or refuse to complete the work at the time as above stated, then he shall pay to the owner the sum of \$30 per day as agreed, settled and liquidated damages for each and every day's delay after the time fixed for completion." The contractors were, however, to have allowance for delays arising from certain enumerated causes beyond their control, among which were neglect and fault of the architect. It was also agreed that:

"No alterations shall be made in the work shown or described by the drawings and specifications, except upon a written order of the architect."

It was also agreed that payments should be made to the contractors from time to time as the building progressed, upon certificates of the architect, and further:

"That no certificate given in payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper material."

It was also agreed that the contractor should furnish a surety bond to save the owners harmless from liens and from all losses or damages of whatsoever character arising in the execution of the contract. The bond having been executed accordingly with the National Surety Company, as surety thereon, the construction of the building was proceeded with by the contractors. The building was not completed on February 20, 1911, as agreed upon, nor was it completed to the satisfaction of the architect on May 24, 1911. On that day the contractors, in writing notified the architect, and also the owners, of their claim that the contract had been performed, and that they left the building completed according to the terms of the contract and arrangements for extra work and material, and demanded payment of the unpaid balance upon the original contract price of \$5,550, and also of

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the sum of \$4,042 for extra work and material, which they claimed to have put into the building as shown by their itemized statement furnished to the architect and owners a few days previous. The architect and owners then declined to accept the building as completed, and declined to make payment of any of the sums so demanded. The building was abandoned by the contractors on May 24th, and thereupon the owners caused the same to be finished, as they claim, to conform to the plans and specifications of the contract made for its construction. In this work the owners claim to have necessarily expended over \$7,000, and that they did not succeed in completing the building according to the contract and plans and specifications for its construction until July 12, 1912, which resulted in their further damage under the \$30 per day demurrage clause of the contract, measurable by computation up until that date. These items, together with laborers' and materialmen's liens, aggregating \$10,170 adjudged against the building, are claimed by the owners as the total amount of their damages resulting from the failure of the contractors to construct the building as agreed upon.

Relative to the claim made by the owners for damages resulting to them from the necessity of expending over \$7,000 to finish the building according to the contract and plans and specifications, it is contended by counsel for the owners that the trial court erred in not allowing the full amount claimed by them therefor; while it is contended by counsel for the contractors, the bank, and the surety company, that the trial court erred in allowing any sum upon these claims. A laborious examination of large and numerous cited portions of this voluminous record, called to our attention in the briefs of counsel for the respective parties, convinces us that we are not called upon to enter upon a discussion of the vast number of detailed facts involved therein further than to say that we find such conflict in the testimony from which the rights of the respective parties must be determined that we cannot see our way clear to disturb the conclusions reached by the

trial court thereon. Generally speaking, it appears to us that there was a marked want of care and skill by the contractors in the construction of the building. We cannot say that the trial court, seeing and hearing the great number of witnesses whose testimony bore upon these numerous items of claimed damages, failed to fairly measure their total in making up its final decree.

Relative to the claims of the contractors for extra labor and materials put into the building because of alleged changes made in the plans and specifications by the architect as the building progressed, counsel for the contractors, the bank and the surety company contend that the trial court erred in not allowing the full amount claimed therefor; while counsel for the owners contend that the trial court erred in allowing any sum whatever for these claims. Passing the question of conflict in the evidence relative to these alleged changes in the plans and specifications, and the extra work and labor claimed to have been put into the building as a result thereof, we are met with one fact which we think is conclusively shown by the record and is determinative of those contentions. We have noticed that, when the contractors abandoned the building and claimed that it was completed on May 24th, in addition to their claim of \$5,500 then unpaid upon the contract price, they claimed over \$4,000 for extra work and material. This claim for extra work and material was thereafter increased, so that at the trial it amounted to approximately \$7,000. The trial court in rendering its decision allowed \$4,883 on these claims, in addition to allowing the contractors credit for the \$5,500 retained by the owners upon the contract price, as an offset against the damages which it allowed to the owners. We think the record conclusively shows that none of these claims for extra work and material were based upon any "written order of the architect," except some small items to be hereafter noticed. Indeed, we are unable to find in the briefs of counsel that it is seriously so contended. Assuming that the architect caused such extra work and material to

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be put into the building by oral direction, which is a matter in serious dispute, we think it clear from the record that the owners at no time consented to any such change or had any knowledge thereof. We are not referring to extras agreed to in writing and paid for without controversy. Under such a state of facts, we think the law is well settled that an owner cannot be held liable to pay for such extra work and material. In the case of *Langley v. Rouss*, 185 N. Y. 201, 77 N. E. 1168, the court of appeals, having under consideration this question, arising in practically the same manner as in this case, and under a contract the terms of which were in substance the same as here involved, held, in keeping with the general rule, that the owner cannot be held liable for such extra work and material, and, among other things, said:

“The contractor is not required to make changes or perform extra work unless he first receives written authority therefor and the contract is, therefore, neither unreasonable nor severe, and it should be enforced. An agent cannot enlarge his own powers by waiving the limitations thereon. In *Woodruff v. Rochester & Pittsburgh R. R. Co.*, 108 N. Y. 39, plaintiffs as sub-contractors did work upon the request of the engineers in charge of the work, and under an agreement made with them by which such work was taken outside of the contract, and was to be paid for at cost and ten per cent added, and this court said, ‘if extra work, not covered by the precise terms of the contract, then it is provided in the contract that no claim should be allowed for such work, unless the same should be done in pursuance of a written order from the engineer in charge, and the claim made at the first settlement after the work was executed.’ This was one of the terms of the contract, and we are unable to perceive that the engineers had any power or authority to alter or change it. It was inserted in the contract to protect the defendant from claims for extra work which might be based upon oral evidence, after the work was completed, and when it might be difficult to prove the facts in relation thereto. If the engineers in charge had an unlimited authority to change the contract at their will, and to make special agreements for work fairly embraced therein, then the defendant had very

little protection from the reduction of their contract to writing.”

In the case of *McNulty v. Keyser Office Bldg. Co.*, 112 Md. 638, 76 Atl. 1113, the court disposed of the question, where it was similarly involved, in favor of the owners; and after quoting with approval from 6 Cyc. 29, and 2 Am. & Eng. Ency. Law (2d ed.), 821, said:

“In accord with this statement of the law is the case of *Baltimore Cemetery Co. v. Coburn*, 7 Md. 202. Coburn had agreed to erect a gateway for the Cemetery Co. at the entrance of the cemetery, and the written contract between them provided that ‘should any alteration be contemplated from the design it may be done, provided the parties beforehand agree upon the price and endorse it upon the contract, and unless such agreement be also entered, it is to be taken to be an agreement to make the alteration without any change in price of the original contract.’ The architect directed two windows to be placed in the gateway which he deemed necessary to its symmetry and beauty in consequence of the two chimneys being placed in a position different from that contemplated by the original plan, and Coburn sued to recover for this extra work. In refusing to allow Coburn to recover, Judge Tuck, speaking for the court, said: ‘It is impossible to conceive the use of inserting any such provision, if it is to have no effect in a case like the present. Owners are very much in the power of builders and architects. Changes, apparently unimportant, are often made, the first knowledge of which comes to the owner in the shape of an additional charge for extra work. It may have been to prevent this, and the controversy that often arises from verbal arrangements supplementary to written agreements, that the parties had this cautious provision inserted. It was a clause for the benefit of both, especially for that of the owner. If the plaintiff, relying on the assurance of the architect, chose to perform this work without placing it within the protection afforded to the parties by the contract, he must bear the consequences.’”

In the case of *Brown v. Winehill*, 3 Wash. 524, 28 Pac. 1037, this court made remarks in harmony with these views, as follows:

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"When parties have entered into a solemn agreement in writing, by the terms of which certain things are to be required as a condition precedent to payment, or other act, by either party, and such conditions are of such a nature that their performance or non-performance will also be evidenced by writings, public policy demands that neither of the parties should be held to have waived such conditions without proofs of the clearest and most satisfactory kind. The very object of the parties in entering into a written contract, and providing that the performance of certain required conditions be evidenced by writings, is to avoid any controversy or question of veracity that may arise in the course of the performance of such a contract."

See, also, *Baltimore & Ohio R. Co. v. Jolly Bros. & Co.*, 71 Ohio St. 92, 72 N. E. 888; *Van Buskirk v. Board of Education, etc.*, 78 N. J. L. 650, 75 Atl. 909.

Counsel for the contractors cite and rely upon the following decisions of this court: *Long v. Pierce County*, 22 Wash. 330, 61 Pac. 142; *Crowley v. United States Fidelity & Guaranty Co.*, 29 Wash. 268, 69 Pac. 784; *Cowles v. United States Fidelity & Guaranty Co.*, 32 Wash. 120, 72 Pac. 1032, 98 Am. St. 838; *Gehri & Co. v. Dawson*, 64 Wash. 240, 116 Pac. 678.

We think a critical reading of these cases will show that the owners were there held liable because of the general agency power of the architect beyond that which is shown in this case, or because the owners themselves authorized the change of the plans and specifications in such manner as to be an actual modification of the original building contract. In the *Long* case, it was held that the terms of the contract did not require a written order of the architect under the particular circumstances there involved, the claim of the contractor being that the extra work and the price therefor was agreed upon between him and the architect. The court held that this was sufficient to bind the county, the owner, since the contract required a written order from the architect for the doing of the extra work only when there was no agree-

ment as to the amount and value of such work at the time it was done. In the *Crowley* case, it was held that where the owner himself directed the extra work to be done he was liable to pay therefor. In the *Cowles* case, the provisions of the contract were waived by the owner himself. In the *Gehri* case, there was involved an instruction given to the jury which in effect submitted to it the question as to whether the owner had waived the provision of the contract relative to the architect directing the contractor in writing. Other cases cited by the counsel for the contractors we think can be similarly distinguished from the facts of this case. The owners not having waived the provisions of the contract requiring the architect to evidence his directions to the contractors in writing, we are constrained to hold that the owners were in no event rendered liable for the contractors' claims for extra work and material put into the building. It follows that the trial court erred in allowing these claims of the contractors in any sum whatever, except the small items to be hereafter noticed.

Relative to the claim of the owners for overtime under the demurrage clause of the contract, it is contended by counsel for the contractors, the bank, and the surety company that the trial court erred in allowing any sum on that account to the owners; while it is contended by counsel for the owners that the trial court erred in not allowing the full sum so claimed. These contentions present a most difficult problem. Indeed, the facts bearing upon it are so involved as to render it impracticable of solution with any degree of exactness, or to dispose of the question upon any sound logical basis. We think the evidence discloses faults both of the contractors and the architect. This view seems to have been entertained by the trial court, and seems to have largely influenced it in measuring the rights of the parties touching this claim. While there is evidence showing that the contractors were dilatory in the prosecution of the work, it may be said that the evidence also shows that a considerable portion of the

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delay was caused by acts of the architect, which it seems to us were not warranted by the necessities of the case. It also appears that on April 22, 1911, which was some considerable time after the expiration of the time for the completion of the building, the owners paid to the contractors upon the work \$1,432, and at a time when, according to the claims of the owners, the building was defectively constructed and far from being completed according to the plans and specifications. While the owners claim that they were unable to complete the building until July 12th, nearly two months after they took possession of it and commenced work thereon, it seems to us, from an examination of items of their claimed damages, that they could have finished the building so as to make it comply with the contract in a much shorter time. Having in view all of the facts and circumstances touching the respective faults of the contractors, the architect, and the owners, and the payment of a large sum to the contractors after the contract time for completion and when the owners were claiming defective construction, we conclude that it is wholly impracticable to apportion the claimed damages for delay in the finishing of the building, and therefore none should be allowed under the demurrage clause in the contract. This conclusion finds support in the following decisions: *Champlain Const. Co. v. O'Brien*, 117 Fed. 271; *Cooke v. Odd Fellows' Fraternal Union*, 49 Hun 23, 1 N. Y. Supp. 498; *Hutton Bros. v. Gordon*, 2 Misc. Rep. 770, 23 N. Y. Supp. 770; *Brodek v. Farnum*, 11 Wash. 565, 40 Pac. 189.

We have noticed that one of the items of damage allowed to the owners against the contractors is that of \$10,170, the total of the liens and costs adjudged in favor of the laborers and materialmen. No contention is made by counsel for the contractors, the bank, and the surety company against this item of damage, except in so far as the court awarded to the lienors attorney's fees in each of their foreclosures, and allowed the amount of such attorney's fees as a part of the

owner's damages against the contractors. The complaint seems to be that the owners did not use due diligence in settling these claims without waiting for judgment of foreclosure to be rendered upon each of them. We think it plain, however, from the evidence that the owners used due diligence by seeking from the contractors information relative to the just amounts due upon the lien claims, without receiving such information as would have justified their payment by the owners. We think, under the circumstances, the owners were not obliged to settle with the claimants before judgment was rendered foreclosing their claims, in order to mitigate the increased damages caused by allowing of attorney's fees in the foreclosures.

Some contention is made that the surety company should in any event be released and no judgment be rendered upon its bond in favor of the owners. This contention seems to be rested upon the assumption that there had been material changes in the building contract. We think it plain from the evidence that whatever change was made in the way of additions, authorized in writing by the architect or owners, came to the notice of the surety company in due time, and that its consent was given thereto with the understanding that its liability upon the bond should not be impaired; and in view of the fact that the only damages finally awarded to the owners as the result of the final disposition of the cause by our decision are those resulting from liens and defective construction, we are of the opinion that no legal ground exists upon which the surety company can be relieved from liability.

We conclude that the trial court erred in allowing the contractors the sum of \$1,883.45 for extra work and material, except small items included therein amounting to \$219.70, as to which there is no dispute; that is, there was error in allowing \$1,663.75 to the contractors for extras; and also that the trial court erred in allowing to the owners the sum of \$990 for overtime under the demurrage clause of the contract. It follows that the difference between these

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sums, to wit, \$673.75, should be added to the judgment in favor of the owners. The cause is remanded to the trial court with direction to correct its judgment accordingly.

While this disposition of the cause results in a judgment somewhat more favorable to the owners than that rendered in the superior court, we conclude that no judgment should be rendered in this court in favor of either party for costs. We arrive at this conclusion in view of the fact that both sides have appealed, and that both have been in a measure successful in their contentions here. This makes the question of costs in this court a matter of discretion with us. Rem. & Bal. Code, § 1744 (P. C. 81 § 1241).

Crow, C. J., Mount, Chadwick, and Gose, JJ., concur.

[No. 11106. Department Two. June 19, 1913.]

W. F. RASKE, *Appellant*, v. NORTHERN PACIFIC RAILWAY
COMPANY, *Respondent*.¹

MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—DEFECTIVE RAILWAY SWITCH—EVIDENCE—QUESTION FOR JURY. The negligence of a railroad company in failing to inspect a switch, in which two 85 pound track bolts had been placed between the switch point and stock rail in such a manner as to cause the derailment of a train and injury to a trainman, is for the jury, where the engineer of the last train over the switch noticed a rattling, stopped his train and made an inspection of part of the track, and finding nothing wrong notified the dispatcher to have the east switch of the east-bound track inspected by the next train, which was done without finding anything wrong, when an inspection of the east end of both the west and east-bound switches would have disclosed the fault.

SAME—ACTIONS—COMPLAINT—ISSUES, PROOF AND VARIANCE. A complaint against a railroad company based on the negligent maintenance of a defective switch is broad enough to admit of evidence that it had received notice that the switch was defective and negligently failed to inspect the same.

¹Reported in 132 Pac. 865.

APPEAL—DECISION—REMAND. Upon reversing a judgment for defendant notwithstanding a verdict for the plaintiff, the defendant is entitled to have its motion for a new trial passed upon by the lower court.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered February 7, 1913, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a fireman through the derailment of an engine. Reversed.

Govnor Teats, Leo Teats, and Ralph Teats, for appellant.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, for respondent.

MORRIS, J.—Appellant was, on September 19, 1912, employed by respondent as a fireman on one of its passenger trains running between Pasco and Ellensburg. At about 2:30 a. m., the engine on which he was working was derailed while passing over the east end of the west-bound switch near Pomona, breaking some of the steam pipes and inflicting burns upon appellant's body from the escaping steam. Suit was brought, and upon the trial verdict returned for appellant. Respondent then filed a motion for judgment notwithstanding the verdict, and for a new trial upon the usual grounds, in case its first motion was denied. This motion being heard, the lower court granted that for judgment notwithstanding the verdict, but made no order relative to the motion for a new trial; and this appeal follows.

The lower court, we apprehend from the record before us, was influenced in granting the motion for judgment by evidence introduced by respondent showing that two 85-pound track bolts had been placed between the switch point and stock rail in such a manner as to swing the switch point away from the stock rail, allowing the forward trucks of the engine to follow the stock rail until they struck the bolts, knocking them out and permitting the switch point to swing

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back into proper position so that the engine drivers followed the main line of track, causing the derailment. Upon these facts; respondent contended that, having fully accounted for the cause of the accident as one relieving it from liability, and this evidence being uncontradicted, there was no fact to be submitted to the jury, and it was entitled to a dismissal.

However this may be, if it was the only point to be considered by the court in ruling upon respondent's motion for judgment, we express no opinion, as there is, in our opinion, another question in the case which made its submission to the jury proper, and error for the court to overrule the verdict. Train No. 2, going east, passed this switch at Pomona at 2 a. m. of the same night. The conductor of this east-bound train testified that, after passing Pomona some distance, he felt something rattling under his train, and applying his emergency air, stopped his train about a mile and a half east of Pomona and made an examination in the endeavor to ascertain if anything was wrong. Not finding anything wrong with his train, he walked back about a mile toward Pomona and examined the track, but finding nothing wrong went on; that when he reached North Yakima he called up the dispatcher and told him of these facts, and suggested that he notify the west-bound train to examine the east switch of the east-bound track at Pomona. The dispatcher then gave order to the west-bound train, upon which appellant was firing, to examine the east switch of the east-bound track at Pomona. The train, arriving at this switch, was stopped and the switch examined. Finding nothing wrong, the train proceeded on its way until it reached the east end of the west-bound switch, when the accident occurred.

Upon this evidence it seems to us a question of fact for the jury whether the respondent performed its whole duty in confining its inspection to the east-bound switch. The jury might have found that, under the circumstances, the conductor of No. 2 did not do his whole duty in calling for an inspection of the east switch of the east-bound track; that if he was im-

pressed with a suspicion that something was wrong with the switch, he should have included the east end of both the west and east-bound switches, and if this had been done and the dispatcher so notified the crew of appellant's train, the situation would have been discovered and the injury prevented. It might also have been found that, when the dispatcher received word from the conductor of No. 2 that something might be wrong with the east end of the east-bound switch, it was his duty to order an examination of the east end of the west-bound switch. Many other questions might arise touching the inquiry which are purely questions of fact, such as whether the conductor of No. 2, passing over these switch points at a high rate of speed in the nighttime, could safely assume that, if there was any trouble at the switch, it was at the point he indicated rather than at the point where the accident occurred.

Respondent suggests that the complaint is not based upon the failure of respondent to properly inspect, but rather upon the negligent maintenance of a defective switch. If, however, respondent had received notice that the switch was defective, and the jury should find that the notice given by the conductor of No. 2 was a sufficient notice of the defective switch, then it was the duty of respondent to inspect that switch, and failing to do so, it maintained a defective switch within the meaning of that charge in the complaint. We think, therefore, the complaint was broad enough to sustain a judgment upon this theory. For these reasons, we are of the opinion the lower court should have denied respondent's motion for judgment notwithstanding verdict.

No order was made by the lower court upon the motion for a new trial. Respondent is entitled to have this motion passed upon by the lower court, and following our practice in such cases, as determined in *Budman v. Seattle Elec. Co.*, 61 Wash. 281, 112 Pac. 356, the judgment of dismissal is reversed, and the case remanded with instructions to the lower court to pass upon the motion for a new trial on grounds other than

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the ones here discussed, and if the lower court shall be of opinion that the said motion for a new trial is well taken upon other grounds, the same shall be granted; but if said motion is denied, then judgment shall be entered upon the verdict.

ELLIS, FULLERTON, and MAIN, JJ., concur.

[No. 10953. Department Two. June 19, 1913.]

B. W. KIBLER *et al.*, *Respondents*, v. MARYLAND CASUALTY COMPANY, *Appellant*.¹

INSURANCE — INDEMNITY INSURANCE — POLICY — LIABILITY — LOSSES COVERED. A policy of indemnity insurance indemnifying contractors on city sewers against loss from liability "imposed by law" upon the assured on account of bodily injuries accidentally suffered by any person while about the construction of the sewers, covers a loss suffered by the assured by reason of being liable over to the city for damages it was compelled to pay to a pedestrian who fell into the sewer because of its unguarded condition; since the liability of the city did not lessen the liability of the assured, who committed the original wrong; and it is immaterial that the assured was not a nominal party to the action against the city.

JUDGMENT — PERSONS CONCLUDED — INDEMNITY — SURETIES HAVING NOTICE. A judgment against a city for personal injuries sustained by one who fell into an unguarded sewer excavation, is admissible in evidence against the contractors to establish their negligence, and also against their insurer indemnifying them against loss, where the contractors' negligence was the issue in the suit against the city, and the contractors and their insurer had notice of the suit and employed counsel to defend it.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered September 5, 1912, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action upon an indemnity insurance policy. Affirmed.

¹Reported in 132 Pac. 878.

Hudson, Holt & Harmon, for appellant.

Hastings & Stedman and *Fletcher & Evans*, for respondents.

MORRIS, J.—In July, 1910, appellant issued to respondents a policy of insurance, indemnifying them against loss for damages on account of injuries accidentally suffered by any person while about the construction of certain sewers at Grangeville, Idaho, for which respondents had obtained a contract from such city. In August a young lady named Vinnie Bourland fell into one of the sewer trenches, and received certain injuries for which she brought suit, joining the city and respondents as defendants. Respondents delivered the complaint served upon them to appellant, with a request that it appear and defend the action under the terms of its policy. Appellant acquiesced in this request, employed counsel, and took full charge of the case as against respondents. The complaint was twice amended, the second amended complaint alleging the same negligent act as the original in permitting the open trenches to remain without proper protection. This last complaint omitted respondents as defendants. Thereupon appellant wrote respondents the following letter:

“Feb. 24, 1911.

“Moore & Kibler,

“Gentlemen: I have just received a telegram from our attorneys at Grangeville, Idaho, that the suit of Miss V. Bourland against the city of Grangeville and yourselves has been dismissed as against yourselves. I am instructing our attorney to continue in the case as a first rate counsel with the corporation counsel of the city of Grangeville, but in so doing we wish it to be understood that it is under a reservation of our right, as we are not responsible, under our policy, for any judgment which may be rendered against the city of Grangeville. I expect to leave for Grangeville tomorrow night, and will keep you posted as to how matters are going on at that place. Yours very truly,

“N. B. Colding,

“Northwest Claim Division.”

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Counsel employed by appellant and the city attorney of Grangeville jointly prepared and filed answer to this amended complaint, in which it was alleged, that the city let the contract for digging the sewer to respondents; that the trench in which Miss Bourland fell had been made by respondents in the construction under their contract, and that it was respondents' duty to properly protect the excavation so as to avoid injury to all persons, and that the city had no notice of the existence of the unguarded excavation. The cause was reached for trial in September, 1911, and at request of a representative of appellant, witnesses were procured by respondents to testify in behalf of the defense. None of these witnesses were used at the trial, which resulted in a verdict against the city for \$5,000. Respondents then served upon appellant a notice to prosecute an appeal from the judgment, in response to which appellant replied, denying any liability under its policy. No appeal was taken, and subsequently the city paid the Bourland judgment. Respondents then commenced an action against the city to recover the balance due upon their contract, to which the city responded by paying to respondents the balance due, except \$5,548.35, the amount of the Bourland judgment, and in answer pleaded as an offset its right to retain this sum, in that the negligence resulting in the Bourland judgment was the negligence of the respondents, and that respondents were liable to the city in the amount it had been compelled to pay in satisfaction of the judgment. Respondents requested appellant to defend against this claim of the city, to which appellant responded, denying any liability under its policy and refusing to participate in the action. The result of this action was favorable to the city, and it was permitted to retain the amount paid by it in satisfaction of the Bourland judgment. Respondents then commenced this action against appellant to recover the amount of the Bourland judgment, upon the theory that it was a liability imposed upon appel-

lant under its policy, and being successful below, appellant has brought the case here.

If we properly understand the point upon which appellant seeks to avoid this judgment, it is a contention that the policy contemplated indemnity against direct actions by injured persons against respondents, and that it was not intended to cover any loss that respondents might suffer by reason of being liable over to the city for any sum it was compelled to pay because of damages to injured persons in the negligent performance of the work. It also suggests an insufficiency of proof. The indemnifying clause in the policy is "against loss from the liability imposed by law upon the assured for damages on account of bodily injuries, etc." What was the liability "imposed by law" upon respondents in the performance of their contract with the city? So far as is here material, the law imposed upon respondents the duty of using a proper degree of care in the progress of their work, to avoid causing damage or injury to those making lawful use of the streets. It is true that the city was also liable because of its duty to keep its streets in such a condition that pedestrians might walk upon them in safety. But this liability upon the part of the city in no wise lessened the liability imposed by law upon respondents to answer in damages to any persons injured because of their negligence in the construction of the sewers. So far as any injured person is concerned, he had, under such circumstances, a cause of action against either the city or the person doing the work, and this cause of action arises out of a liability imposed by law, and if the injured person seeks his remedy against the city in the first instance, then the city has its right of action against its contractor whose negligence caused the injury.

No authority is needed to substantiate this rule. The complaint upon which the judgment was obtained in Bourland against the city bases the right of action against the city on its negligence in keeping the trenches in its streets unguarded, and in failing to give warning of this unguarded

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condition to passersby. The judgment in that action established that the injury was suffered because of negligence in failing to properly guard the open trenches; and inasmuch as the duty to properly guard the open trenches rested upon respondents, a judgment based upon the failure and neglect to do so established the negligence of respondents. The respondents were liable because they committed the original wrong which caused the injury. The city was liable because it failed to discharge its duty of keeping its streets in proper condition for public travel and preventing injury to others from the wrong of respondents. This brought the case within the terms of the indemnity policy, and the respondents, having paid the judgment establishing their liability, may recover under the terms of the policy from the appellant the amount of the judgment and costs. The principles and many authorities on which this rule rests may be found in *Commissioners of Lexington v. Aetna Indemnity Co.*, 155 N. C. 219, 71 S. E. 214.

It matters not that respondents were not mentioned as defendants in the second amended complaint upon which the Bourland judgment was based. The negligence which established that judgment was their act, and the issue was tendered by the pleadings. Respondents, although not parties to that action, were directly interested in the result of that litigation and actively defended that case. They were, in substance, parties to it and bound by it. *Douthitt v. MacCulsky*, 11 Wash. 601, 40 Pac. 186; *Shoemaker v. Finlayson*, 22 Wash. 12, 60 Pac. 50; *Ramsey v. Wilson*, 52 Wash. 111, 100 Pac. 177. So with appellant: It had full knowledge of the pendency of that action, employed counsel to defend it, and it is likewise bound by the adjudication of respondents' negligence. *Spokane v. Costello*, 33 Wash. 98, 74 Pac. 58; *Seattle v. Saulex*, 47 Wash. 365, 92 Pac. 140. The judgment in that case was, therefore, properly admitted in order to establish negligence of the respondents and the consequent liability of appellant under its indemnifying bond.

In this case it appeared that the open and unguarded trench into which Miss Bourland had fallen and received her injury, and which was the cause of action pleaded by her against the city, was excavated by respondents, making them the responsible cause of the defect upon which the judgment was based. This was sufficient to establish the right of recovery against the respondents and the liability of appellant. *Seattle v. Regan & Co.*, 52 Wash. 262, 100 Pac. 731, 132 Am. St. 963.

We find no error in any of the rulings complained of, and the judgment is affirmed.

ELLIS, FULLERTON, and MAIN, JJ., concur.

[No. 10769. Department Two. June 19, 1913.]

ENGEBUT LAMOON, *Respondent*, v. SMITH CEMENT BRICK COMPANY, *Appellant*.¹

APPEAL—REVIEW—PLEADINGS—AMENDMENTS TO CONFORM TO PROOF—MASTER AND SERVANT—VARIANCE. A variance between the complaint and proof as to the particular point where a runway for wheeling concrete in wheelbarrows was too narrow, will on appeal be deemed immaterial, or the complaint amended, where the evidence was admitted without objection on the ground of variance or claim of surprise.

MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—PROXIMATE CAUSE—QUESTION FOR JURY. Whether the narrowness of a runway for wheeling concrete in wheelbarrows, was the proximate cause of injury to a servant who fell from the runway when his wheelbarrow struck a post, is a question for the jury, where the post protruded at a right angle turn, and witnesses testified that the runway was dangerous and too narrow to make the turn around the post with safety.

SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. In such a case, whether the plaintiff was guilty of contributory negligence in failing to proceed a foot or eighteen inches further before attempting to make the turn, or negligently lost control of his wheelbarrow before he reached the turn, were questions for the jury, where

¹Reported in 132 Pac. 880.

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the evidence was conflicting; especially since slight negligence in failing to gauge his distance to a nicety would not preclude a recovery.

SAME—ASSUMPTION OF RISKS—OBEDIENCE TO ORDERS—PROMISE TO REPAIR—QUESTION FOR JURY. A servant proceeding along a narrow runway with a loaded wheelbarrow of concrete, in obedience to a direct order, does not assume the risk, where he protested against the use of the narrow runway and the foreman promised to fix it.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered April 11, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee engaged in the construction of a building. Affirmed.

Huffer, Hayden & Hamilton, for appellant.

Govnor Teats, Hugo Metzler, Leo Teats, and Ralph Teats, for respondent.

ELLIS, J.—This is an action to recover damages for personal injuries sustained by the plaintiff while employed by the defendant in the construction of a certain concrete wall of an addition to the Sheridan school, in the city of Tacoma. Plaintiff, when he was injured, on August 12, 1911, had been working for the defendant for a period of three weeks, but only three days of this time was spent in work at the Sheridan school. Prior to that time he was engaged in wheeling concrete for the construction of sidewalks. The concrete wall was ten inches thick, and at the time in question the form for its further construction had reached a height of about twelve feet, the concrete being conveyed from a mixer on the ground up a runway in wheelbarrows. This runway consisted of three 2x12 planks, placed side by side, forming an incline from the ground to a height of about eleven feet, where the runway became horizontal, its width remaining the same. It extended beyond and at right angles to the wall form into which the concrete was being poured, to a similar wall a number of feet distant from and parallel to the first.

To the right of the runway and at the point where it became horizontal, a 2x6 post protruded about 1½ feet above the surface of the runway. Between 12 and 20 inches further along the runway, a similar 2x6 post was encountered. Braces had been nailed to these two posts in the construction of the forms for holding the concrete. One witness testified that a number of 2x4 timbers protruded above the surface of the runway at this point, rendering it difficult to pass with a wheelbarrow. In order to reach the point where the concrete was being poured, it was necessary to pass around these two 2x6 posts, turn to the right, and follow a runway made of two 2x12 planks, running parallel with the wall. Plaintiff, when first ordered to work on this particular runway, told one Ellison, defendant's foreman, that the runway was not wide enough to turn with the wheelbarrow, and Ellison ordered him to go ahead and "wheel concrete," that he would "fix the scaffold." Shortly after this protest and promise, the plaintiff started up the runway with a wheelbarrow loaded with concrete, being assisted up the incline by one Thompson, who placed his shovel on the nut at the end of the axle on the right-hand side of the wheelbarrow, and walked backward up the incline. The wheelbarrow, which is in evidence, has an iron body 3x2 feet, and is 28 inches in height at the front and 24 inches at the rear end, the entire length being 5 feet 8½ inches. About two feet below the first 2x6 post, Thompson removed his shovel from the wheelbarrow, and the plaintiff proceeded unassisted until he reached the level surface, when the wheel or, as some of the witnesses testified, the side of the wheelbarrow struck the first 2x6 post. The wheelbarrow tipped to the left, its right handle striking plaintiff, causing him to fall to the ground and sustain the injuries for which he sues. The trial resulted in a verdict and judgment for the plaintiff. At appropriate times defendant interposed motions for nonsuit, for a directed verdict, and for a new trial, all of which were denied. The defendant has appealed.

Appellant's first contention, if we correctly understand it,

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is that there was a variance between the complaint and the evidence, in that the complaint alleged that the respondent objected to the narrowness of the runway at the point where the wheelbarrows were to be emptied and that the foreman promised to widen the runway at that point, whereas the evidence showed that both the objection and the promise related to the place where the turn had to be made. We find no merit in this contention. While the testimony of the respondent and two or three other witnesses was clear and convincing that the protest and promise were made and related to the last mentioned place, this evidence was not objected to on the ground of variance at the time of its admission, nor was any prejudicial surprise claimed. In such a case, it is elementary that the pleading will be deemed amended to conform to the proof. In any event, the variance hardly arises to the dignity of a substantial departure warranting a reversal. *Hansen v. Rounds*, 70 Wash. 350, 126 Pac. 927.

It is next claimed that no causal connection was shown between the defect and the injury; the argument being that the collision of the wheelbarrow with the post was caused "by the joint action of the pushing and pulling forces exerted by the respondent and Thompson," and that the proximate cause of the injury "was the manner in which the wheelbarrow was handled." These forces, of course, had to be exerted whatever the width of the runway. The evidence tended to show that the wheelbarrow was run up the incline rapidly in order to make the grade, and that shortly after Thompson released his hold on the wheelbarrow, it veered to the right and struck the post. The respondent testified to the effect that he was just starting to make the turn, and that in so doing he struck the post because the place was too narrow to avoid it. Another witness testified that he would have to go pretty close to the post "to get around there." A third witness testified that he saw the respondent attempting to make the turn at the time of the accident, and that the space was too narrow and was dangerous even when care was

395, 71 Pac. 39; *Missouri Pac. R. Co. v. Mackey*, 33 Kan. 298, 6 Pac. 291. The jury still might have found that the narrowness of the scaffold was the proximate or efficient cause of the injury.

Did the respondent assume the risk? That the dangers attendant upon the narrowness of the platform were open and obvious is admitted. The respondent and another man observed them and protested against their continuance. The respondent and two other witnesses testified positively that he proceeded with the work only after a direct order from the foreman supplemented by a promise to remedy the defect. We will not review the evidence further than to say that we deem the protest, order and promise overwhelmingly established, and that the promise related to the place where the turn had to be made, not the place where the wheelbarrows were to be emptied, as claimed by the appellant. Where the servant proceeds in obedience to an order, even without a promise to repair, he does not, as a general rule, assume the risk of unnecessary dangers injected into the work by the master's negligence.

"The servant assumes the risk of obedience, or is guilty of contributory negligence in obeying the order, only when the added danger so incurred is open, patent and obvious alike to man and master, and so plain that reasonable men might not differ as to its existence, and so imminent that a reasonably prudent man would not obey the order. 'In other words, if a danger is not so absolute or imminent that injury must almost necessarily result from obedience to the order, and the servant obeys the order and is injured, the master will not afterwards be allowed to defend himself on the ground that the servant ought not to have obeyed the order.' 1 Labatt, Master and Servant, p. 1241, § 439." *Rogers v. Valk*, 72 Wash. 579, 131 Pac. 231.

See, also, *Withiam v. Tenino Stone Quarries*, 48 Wash. 127, 92 Pac. 900; *Campbell v. Winslow Lum. Co.*, 66 Wash. 507, 119 Pac. 832; *Offutt v. World's Columbian Exposition*, 175 Ill. 472, 51 N. E. 651; *Gundlach v. Schott*, 192 Ill. 509, 61

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N. E. 332, 85 Am. St. 348. The question thus becomes one of fact for the jury whenever the minds of reasonable men may differ upon it. *Jobe v. Spokane Gas & Fuel Co.*, 73 Wash. 1, 131 Pac. 235; *Pearson v. Federal Min. etc. Co.*, 42 Wash. 90, 84 Pac. 632; *Etheridge v. Gordon Const. Co.*, 62 Wash. 256, 113 Pac. 639; *Chicago Hair & Bristle Co. v. Mueller*, 203 Ill. 558, 68 N. E. 51; *Chicago & A. R. Co. v. House*, 172 Ill. 601, 50 N. E. 151; *Louisville & N. R. Co. v. Kelly*, 63 Fed. 407; *Malott v. Hood*, 201 Ill. 202, 66 N. E. 247.

In the case in hand, the respondent's position is further strengthened by the promise to repair. There was some evidence from which the jury might have found that he proceeded with the work in reliance upon this promise. The promise was unconditional, and related solely to the safety of the servant. We are committed to the rule that in such a case "the risk of the defect is cast upon the master until such time as would preclude all reasonable expectation that the promise might be kept, unless the danger from the defect is so imminent that no person of ordinary prudence would risk injury from it." *Morgan v. Rainier Beach Lum. Co.*, 51 Wash. 335, 98 Pac. 1120, 22 L. R. A. (N. S.) 472; *Crooker v. Pacific Lounge & Mattress Co.*, 29 Wash. 30, 69 Pac. 359; *Shea v. Seattle Lum. Co.*, 47 Wash. 70, 91 Pac. 623; *Hough v. Railway Co.*, 100 U. S. 213; 26 Cyc. 1209, and cases there collected. Clearly the question of assumption of risk was one for the jury.

A review of the many authorities cited by the appellant from this and other jurisdictions would serve no purpose. They merely illustrate the fact so often noted that each case of this character is largely determinable from its own facts and circumstances.

Many assignments of errors claimed are based upon the giving of certain instructions and the refusal of certain others. Most of these are sufficiently disposed of by what we have already said. To review them all in detail would extend this

opinion to an interminable length. We have examined with care both the instructions given and those refused. The instructions given were full and complete and correctly stated the law applicable to the facts.

We find no error which would justify a reversal.

The judgment is affirmed.

MAIN, MORRIS, and FULLERTON, JJ., concur.

[No. 10825. Department Two. June 24, 1913.]

*In the Matter of the Estate of MOLLIE WITT, Deceased.*¹

EXECUTORS AND ADMINISTRATORS—FINAL SETTLEMENT—ITEMS AND CREDITS—EVIDENCE—SUFFICIENCY. A charge of \$9,500 against an executor for wheat shown by an annual report to have been deposited in a warehouse, is properly reduced to \$6,500 on final settlement, where it appears that the annual report by mistake included \$3,000 worth of wheat not grown by or belonging to the estate.

SAME. On final settlement of an estate, an executor, charged with the cost of an automobile, is entitled to be credited with its selling price which he had turned into the estate.

SAME. On final settlement, an executor is entitled to credit for an overdraft at a bank where he kept funds of the estate, where the sum was expended on behalf of the estate.

SAME—ATTORNEY'S CHARGES. An attorney's fee of \$2,250, allowed for services in the settlement of an estate appraised at \$37,761, is not unreasonable, when the estate was kept open a long time in an effort to pay off an indebtedness of \$17,000 without disposing of the real estate.

Appeal from a judgment of the superior court for Lincoln county, Baske, J., entered June 5, 1912, upon exceptions to the final account of an executor. Affirmed.

Lovell & Davis, for appellant.

Joseph Sessions, for respondent.

¹Reported in 132 Pac. 1012.

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Opinion Per FULLERTON, J.

FULLERTON, J.—In October 1906, Mollie Witt, then a resident of Lincoln county, Washington, died testate therein, devising her estate to her children and naming her husband, August Witt, as executor thereof. Her estate consisted of 320 acres of farm land which she held in her own separate right, a community interest in 540 acres of farm land, and a community interest in certain personal property, consisting of live stock, farming implements, and farm products; the whole being appraised at \$37,761. The indebtedness of the estate at that time was something over \$17,000. On April 13, 1912, the executor filed his final account with the estate. This account contained an itemized statement of the receipts and expenditures of the executor during the course of his administration, and showed generally the condition of the estate, and that it was ready to be closed and the property distributed to the heirs and devisees thereof. A time was fixed for hearing the account, at which time the beneficiaries named in the will appeared and challenged the correctness of the account, making specific objections to numerous items contained therein. On the hearing, the court allowed certain of the items objected to, and disallowed others, entering a decree approving the account as corrected, and distributing the estate. The devisees appeal.

Only four of the disputed items are in question in this court. The court charged the executor with the sum of \$6,500 on account of the crops from the farm lands for the years 1909 and 1910, whereas the devisees claim that he should have been charged with \$9,500. It was shown by the warehouseman's books that wheat to the value of the latter sum was delivered and sold to the warehouse company by the executor during the years named, and it appears that the executor had at one time so reported in one of his annual accounts. But the executor explains that his report was the result of a mistake; that while he delivered and sold to the warehouse company the quantity of wheat shown by their books, a part of it, equal in value to \$3,000, was actually grown on lands

having no connection with the estate of which he was executor, and was included by him in his former account through an error on the part of his counsel. The court gave credence to this explanation, and we feel constrained to do so also.

The second item relates to the purchase price of an automobile purchased by the executor. The executor charged the estate with this item, and the court disallowed it to the extent of \$2,000, charging the executor with that sum. The devisees contend that he should have been charged with \$2,330 which they contend was the actual cost of the automobile. The evidence as to this item is not altogether clear, but we gather from the record that the machine cost originally \$2,330, and that certain additional sums were expended on it to keep it in repair; that it was finally sold as property of the estate for \$500, and that the court reached the sum charged the administrator by adding the costs paid out in repairs on the machine to its original cost and deducting from the total the amount for which the machine was sold. If the executor is to be charged with the cost of the machine, he is entitled to be credited with its selling price which he turned into the estate, and no error resulted from so doing.

The third item is a claim of \$3,600 owing a local bank by the executor at the close of his administration. It seems that the executor kept his account with the bank, and from time to time during the course of his administration turned into the bank moneys received by him on account of the estate, and checked therefrom, as the money was needed, to carry on the business of the estate; the final result being an overdraft in this sum. If the money was expended on behalf of the estate it was clearly an item for which the executor was entitled to credit. The executor contends that it was so expended, and exhibits his account in proof thereof. His balances indicate his contention to be correct, and we see no reason for drawing a different conclusion.

Finally, it is objected that the fees allowed by the court to the executor's counsel were excessive. These aggregated

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\$2,250. The allowance may seem liberal, when measured by the appraised value of the estate, but we think it not extravagant, in view of the services performed by counsel. The estate remained open for a long period of time, due, as the executor says, to an effort to pay the indebtedness without disposing of the real property. This added greatly to the work required of counsel, and it seems to us that the fees allowed were fully earned.

The judgment is affirmed.

MAIN, ELLIS, and MORRIS, JJ., concur.

[No. 11040. Department One. June 24, 1913.]

FRANK FOURNIER *et al.*, Respondents, v. AMERICAN LIFE AND ACCIDENT INSURANCE COMPANY, Appellant.¹

SUBROGATION—RIGHT TO—WRONGFUL ACTS OF AGENT—TRUSTEE EX MALEFICIO. Where an insurance company, through the fraudulent acts of its agent in a trade of the company's capital stock for land, was rendered liable, on rescission of the deal, for the value of part of the land which it had conveyed to an innocent purchaser, it is entitled to be subrogated to the rights of the agent, as a trustee *ex maleficio*, in and to certain notes given to the agent by the innocent purchaser in the course of the trade, and held by the agent or his assigns with notice of the fraud.

Appeal by one of the defendants, from part of a judgment of the superior court for King county, Albertson, J., entered July 8, 1912, upon findings in favor of the plaintiffs, denying subrogation against a codefendant. Modified.

Carkeek, McDonald & Kapp, for appellant.

Ward & Gilbert and *France & Helsell*, for respondents.

Gose, J.—The American Life & Accident Insurance Company is an Oregon corporation, licensed to do business in this state. The controversy arose out of certain alleged fraudu-

¹Reported in 133 Pac. 9.

lent acts and representations of its agent, the defendant, Judson H. Cornish, which culminated in the loss to the plaintiffs of two separate tracts of land containing respectively forty acres and one hundred and sixty acres. The plaintiffs tendered their stock contracts which the insurance company had issued to them, and prayed a rescission, that the land be re-conveyed to them, unless the evidence showed that it was held by an innocent purchaser, and in that event, for damages to the extent of its value in excess of certain mortgage liens.

The court found, that the title to the 40-acre tract was in the defendants Gibbon; that they were innocent purchasers; that the title to the 160-acre tract was in the defendant Frampton & Howie, Inc., a corporation; that it took title through the defendant Cornish, its stockholder and manager, with notice of the infirmity of his title; that Cornish had induced the plaintiffs to convey the land and purchase stock contracts in the insurance company by falsely representing that the stock was dividend-paying when it was not, that it had a value of \$175 per share when its market value did not exceed its face value, i. e. \$100 per share, and that the insurance company would redeem the stock at any time at \$175 per share, the price the plaintiffs agreed to pay. The decree required Frampton & Howie, Inc., to reconvey the 160-acre tract to the plaintiffs; directed the plaintiffs to surrender their several stock contracts to the insurance company, and required it to surrender the plaintiffs' notes which represented the price they had agreed to pay for the stock in excess of the value of the land. The judgment further provides that the plaintiffs recover from the defendant, the insurance company, the sum of \$1,874.76, the value of their equity in the 40-acre tract which they had conveyed to the defendants Gibbon, whom the court found to have been innocent purchasers.

In respect to the sale of the 40-acre tract, the defendant Cornish represented to the plaintiffs, both orally and in writing, that he had received from Gibbon \$1,800 in cash, which he had paid to the insurance company to apply on their stock

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contracts. He made the same representation to the insurance company, and it issued to the plaintiffs three stock contracts for ten shares each at \$175 per share, and credited them with \$600 cash payment upon each thereof. The plaintiffs gave the insurance company three notes for \$1,150 each to complete the payment. The contracts are in terms nontransferable, and provide that, when the purchase price has been paid, the stock will issue. The fact is that Gibbon paid Cornish \$400 cash, and gave him his note for \$1,600 in exchange for a conveyance of the plaintiffs' equity in the land. This note Cornish indorsed to Frampton & Howie, Inc., and later Gibbon took it up and gave it his two notes for \$800 each. These notes were held by Frampton & Howie, Inc., at the time of the trial. The insurance company requested the court to subrogate it in the decree to the rights of Frampton & Howie, Inc., in the Gibbon notes. This the court declined to do. The insurance company reserved an exception to the ruling, and has appealed. Frampton & Howie, Inc., has not appealed.

In the oral argument, the appellant stated, in substance, that it would be content to be subrogated to the rights of Frampton & Howie, Inc., in the Gibbon notes. The plaintiffs, the only other parties who have appeared here, stated that they had no objection to such subrogation. We therefore limit our investigation to this question. As we have seen, the court found that the plaintiffs were defrauded of their land by means of false representations and fraudulent manipulations of the defendant Cornish while acting as the agent of the appellant in selling its stock, and that Frampton & Howie, Inc., had notice of the infirmity in the title of Cornish to the 160-acre tract, and generally of his fraudulent manipulations and transactions with the plaintiffs. The record furnishes indubitable evidence of these facts. Nor is Frampton & Howie, Inc., a holder in due course of the Gibbon notes. The court in the course of its opinion observed that the stock manipulation between Cornish and Frampton & Howie, Inc., was "simply

scandalous." Frampton & Howie, Inc., stands in the shoes of Cornish. To recapitulate: Cornish represented to the plaintiffs and the appellant that he had \$1,800 cash belonging to the plaintiffs out of the sale of the 40-acre tract. Upon this representation, the appellant issued its stock contracts to the plaintiffs. In consequence of Gibbon having been an innocent purchaser, the plaintiffs have a judgment against the appellant for \$1,800 in round numbers, because, and only because, Cornish was its agent in his transactions with the plaintiffs. The appellant may therefore elect to treat Cornish as its trustee *ex maleficio* in the \$1,600 note. Frampton & Howie, Inc., took the note and later the two notes of Gibbon for \$800 each, in lieu thereof, with notice and impressed with this trust. The record is long and complicated, but the subject need not be further pursued. As the learned trial court remarked, the plaintiffs were stripped of their entire fortune through the manipulations of Cornish. The appellant has been made to bear the burden of the wrongful acts of its agent to the extent of \$1,800. It will be subrogated to the rights of the defendant Frampton & Howie, Inc., in the two notes of Gibbon for \$800 each.

Remanded, with instructions to modify the decree as indicated; costs to be taxed against Frampton & Howie, Inc.

CHADWICK, MOUNT, and PARKER, JJ., concur.

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Opinion Per ELLIS, J.

[No. 11224. Department Two. June 24, 1913.]

SEATTLE TAXICAB & TRANSFER COMPANY, *Respondent*, v.
E. O. KINNEY *et al.*, *Appellants*.¹

FRAUDS, STATUTE OF—ORAL CONTRACT OF EMPLOYMENT—WAIVER—FAILURE TO PLEAD OR OBJECT TO EVIDENCE. The objection that an oral contract for employment for five years is void under the statute of frauds is waived by failing to raise it in the lower court either by pleading it as a defense or by objecting to the admission of parol evidence, or by assignment of error thereon in the superior court.

EVIDENCE—PAROL EVIDENCE TO VARY WRITING. Where a memorandum of a sale of corporate stock recited the consideration for only one-half of the stock, sold by one party, and was clearly intended to cover only part of the transaction touching the sale by such half owner, and was incomplete on its face, oral evidence as to the consideration for the balance of the stock purchased from another party is not inadmissible as tending to vary the terms of the writing.

APPEAL—REVIEW—FINDINGS. Findings upon conflicting testimony will not be disturbed when supported by the preponderance of the evidence.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered January 29, 1913, upon findings in favor of the plaintiff, in an action for an injunction. Affirmed.

Wm. C. Keith, for appellants.

Brightman, Halverstadt & Tennant, for respondent.

ELLIS, J.—This is an appeal from a judgment enjoining the defendant from engaging in the baggage transfer business in the city of Seattle for a period of five years from and after July 1, 1912, on the ground that he had entered into a contract with the plaintiff not to do so. The circumstances giving rise to this controversy, so far as material, are as follows: For some years prior to May, 1912, the Seattle Taxicab Company was engaged exclusively in the taxicab busi-

¹Reported in 132 Pac. 1013.

ness, and the Reliable Transfer Company and the Seattle Transfer Company were engaged in the baggage transfer and drayage business, in the city of Seattle. In the winter of 1911, the taxicab company, designing to take over the baggage transfer business of the two last mentioned companies, opened negotiations with the defendant, who, with one Hawkes, owned and controlled all of the 25,000 shares of the capital stock of the Reliable Transfer Company, save 2,250 shares owned by one Griffiths, which shares the defendant agreed ultimately to secure. It was finally agreed that the drayage equipment of the Reliable Transfer Company should be transferred to trustees for the defendant and Hawkes, leaving in the assets of the corporation the contracts and equipment of its baggage transfer business only, so that a transfer of the stock of that corporation would carry the corporate name and the contracts, equipment, and good will of that branch of the business. These were valued, for the purposes of the purchase, at \$10,000, which the taxicab company agreed to pay for all of the stock. This was to be paid as follows: \$2,500 in money, \$5,000 by relieving the defendant and Hawkes from their personal liability as indorsers upon a note of the Reliable Transfer Company with a certain bank, and \$2,500 in stock of the taxicab company at par value.

No one connected with the taxicab company had any knowledge of the transfer business, and it is conceded that one of the moving considerations to the purchase on the part of the taxicab company was that the defendant, who was very efficient in that business, should enter the employ of the taxicab company and manage its baggage transfer department. It was in this connection that the plaintiff claims that a verbal contract was made between the taxicab company and the defendant, whereby the defendant agreed, as an inducement to the purchase of the stock by the taxicab company, not to enter into the baggage transfer business in the city of Seattle, either personally or in connection with, or as an employee of, any one else excepting the taxicab company, for a period

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of five years from the consummation of the purchase of the stock by the taxicab company.

When the negotiations had reached this point between the president and manager of the taxicab company, on the one hand, and the defendant on the other, Hawkes was consulted and on May 18, 1912, assented to the agreement, and the purchase of the half of the capital stock of the Reliable Transfer Company owned and controlled by him was then consummated. He, however, asked that a written memorandum be made, showing that he was to be relieved of liability upon the above-mentioned note. A memorandum was accordingly drawn up and signed by the taxicab company by its manager and by the defendant and Hawkes. It fixed the value of all the stock of the Reliable Transfer Company for the purpose of the sale at \$10,000, and recited the purchase of half of the stock and equipment for \$2,500 in money, and the assumption by the taxicab company of the liability of the defendant and Hawkes upon the \$5,000 note above mentioned, and contained an agreement on the part of the taxicab company to relieve them from that liability, and an agreement on the part of the defendant and Hawkes to pay all other liabilities of the Reliable Transfer Company accruing prior to May 18, 1912. The \$2,500 was then paid, a new note endorsed by the taxicab company was placed in the bank, the old note taken up, and half of the stock of the Reliable Transfer Company was transferred to the taxicab company. New officers were elected and Hawkes retired from the company. Throughout the negotiations it was agreed between the taxicab company and the defendant that the Reliable Transfer Company should be operated independently until the purchase of the baggage transfer department of the Seattle Transfer Company had been consummated, which took place about July 1, 1912.

At that time, the defendant suggested that a written contract for his employment by the taxicab company should be made, indicating some little dissatisfaction with the situation,

but no written agreement was made. It was, however, agreed that, instead of turning over to the appellant \$2,500 worth par value of the capital stock of the taxicab company as a consideration for the transfer of his half of the stock of the Reliable Transfer Company in addition to the assumption of the above mentioned note, there should be turned over to him \$3,000 worth par value of the stock of the taxicab company, which was accordingly done. The stock which he controlled, after having secured the Griffiths stock, was, in exchange for this taxicab stock, transferred to the taxicab company, which thus became the owner of all of the stock of the Reliable Transfer Company. The Seattle Taxicab Company then changed its corporate name to the Seattle Taxicab & Transfer Company, and as such operated its taxicab business together with the baggage transfer business secured by the purchases from the Reliable Transfer Company and the Seattle Transfer Company.

The defendant continued in the employ of the plaintiff corporation, managing its transfer department until October 14, 1912, when the plaintiff, learning that the defendant was purchasing horses for the purpose of entering into the baggage transfer business on his own account in competition with the plaintiff, discharged the defendant and ultimately brought this suit to enjoin him from entering into such business. The evidence was in many particulars conflicting, but we think, by a fair preponderance, it established the foregoing facts.

The appellant claims that there was no competent evidence that he ever agreed not to engage in the transfer business in the city of Seattle for a period of five years, or for any time.

At the outset we deem it expedient to disclaim any intention in this case of passing upon the application of the one-year period of the statute of frauds to contracts such as that here involved. This court has never passed directly upon the question, and the decisions from other jurisdictions are hopelessly divided. 2 Am. & Eng. Ency. Law (2d ed.), p. 495;

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Browne, Statute of Frauds (5th ed.), § 282b. Though this question was obviously involved in the case, it was waived by the failure to raise it, either by pleading the statute as a defense, or by objecting to the admission of parol evidence on this ground in the trial court, or by assignment of error or by argument on the appeal here. We now notice it only in order that this decision may not be deemed authority on that question.

The appellant contends that parol proof of such an agreement was inadmissible in that it tended to change, vary or contradict the written memorandum of sale. This contention is untenable. The written contract shows upon its face that it was only intended as a memorandum touching those things connected with the sale of the half of the stock of the Reliable Transfer Company controlled by Hawkes and to cover certain stipulations as to the assumption of liabilities in which all three of the parties to the sale were interested. The memorandum is incomplete upon its face. While it fixes a value for all of the stock for the purpose of the sale, it recites a sale of only half of the stock and a payment of only a part of the consideration. It makes no mention of a transfer of the other half of the stock, nor of the stock of the taxicab company which the appellant took in exchange therefor. This memorandum was clearly never intended to cover any part of the transaction relating to the other half of the stock of the Reliable Transfer Company which was afterwards transferred by the appellant to the taxicab company, nor any of the other matters connected with the agreement in which the appellant and the taxicab company alone were concerned. The parol testimony as to the agreement on the appellant's part to abstain from the transfer business in the city of Seattle for a period of five years, except as an employee of the respondent, did not tend to vary the terms of the written memorandum, but did tend to establish independent stipulations between different parties.

The appellant also contends that, in any event, the evidence

was insufficient to establish the agreement. While the evidence as to whether such an agreement was made or not is in direct conflict, we think that it preponderates in favor of the respondent. Three witnesses testified to the agreement; the appellant alone denied it. The trial court heard all of the evidence and observed the demeanor of the witnesses. In such cases we have repeatedly refused to disturb the decision of the trial judge unless we were able to say that it was clearly contrary to the weight of the evidence. Upon the whole record, we find nothing warranting a reversal.

The judgment is affirmed.

MAIN, MORRIS, and FULLERTON, JJ., concur.

[No. 11132. Department Two. June 28, 1913.]

In re ELLIOTT AVENUE.

THE CITY OF SEATTLE, *Appellant*, v. GALBRAITH-BACON & COMPANY *et al.*, *Respondents*.¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—REVIEW BY COURTS. In the absence of evidence that an assessment roll, as levied by eminent domain commissioners upon property benefited, was not in accordance with the benefits received, the courts have no power to modify the assessment and charge part of the same against the general fund.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered March 20, 1913, modifying an assessment roll for street improvements, after a hearing on the merits. Reversed.

James E. Bradford, Wm. B. Allison, and C. B. White, for appellant.

Farrell, Kane & Stratton, Bogle, Graves, Merritt & Bogle, Kerr & McCord, and Ballinger, Battle, Hulbert & Shorts, for respondents.

¹Reported in 133 Pac. 8.

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Opinion Per MORRIS, J.

MORRIS, J.—Appeal by the city of Seattle from a judgment of the lower court modifying an assessment roll, as made up and filed by the board of eminent domain commissioners, so as to reduce all assessments appearing upon the roll ten per cent and charge that amount to the general fund. Cases of this character have been so often before this court in the past few years that it might well be said that the law is so well settled that there is nothing new to be said. The only thing we can do is to apply to the case before us the rules established by the previous cases. The latest assertion of the rule here applicable is found in *Spokane v. Miles*, 72 Wash. 571, 131 Pac. 206, where, citing previous cases, it is said:

“The best rule that has been announced, and the only practicable working rule, is that the courts should not change the district established by the commissioners, except where the commissioners have acted arbitrarily or fraudulently or have proceeded upon a fundamentally wrong basis.”

In answering the contention there made, that part of the cost of the improvement should have been assessed to the general fund of the city, it was said: “The evidence does not show that any especial benefit accrued to the city at large in consequence of the improvement,” and cases are cited holding that “the city, like a private owner, can only be assessed for an improvement where it is especially benefited.” In this case, the lower court, in announcing its decision upon the contention of objectors to the roll that the general fund of the city should bear part of the assessment, said: “The fact is that there is no evidence here showing that any of these assessments are not in proportion to the benefits.” If the lower court was of this opinion, the roll should have been sustained. While the lower court has the authority under the statute to modify the assessment roll as returned by the commissioners, to the end that justice may be attained and each tract of land benefited bear its relative equitable proportion of the cost of the improvement, as is said in *Seattle*

v. Sylvester-Cowen Inv. Co., 55 Wash. 659, 104 Pac. 1121, the power so vested in the court must be exercised under the evidence. Like other instances where a discretion is vested in the trial court, it is a judicial discretion and must be exercised according to the facts before the court. In this case the lower court, while frankly admitting there was no evidence to justify its ruling, was of the opinion that the general fund should bear ten per cent of the entire assessment, because he believed that the improvement was "a part of the thoroughfare that we are laying out to Smith's Cove." We find no evidence of that fact. The only mention of it is found in the testimony of one of the witnesses as follows:

"Q. You think that under those circumstances that the city ought to pay a part of it? A. If they were to continue it, the main traffic thoroughfare connecting Smith's Cove and Interbay and through the Ballard district unquestionably some portion should be borne by the general fund. But that condition when we made the roll we did not find existing. Q. Has that been condemned since? A. Yes, that was condemned since this condemnation was instituted."

The facts which might appear upon the confirmation of the roll in some other local improvement proceeding would hardly justify the court in determining the question submitted to it in this.

Finding, as did the lower court, that there is no evidence here showing that any of these assessments are not in proportion to the benefits, we conclude the roll as returned should have been confirmed, and it was error to modify it in the respect complained of. The judgment is reversed with instructions to enter a judgment as here indicated.

MAIN, ELLIS, and FULLERTON, JJ., concur.

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[No. 11004. Department Two. June 28, 1913.]

In re HARRISON STREET.

THE CITY OF SEATTLE, *Respondent*, v. SEATTLE ELECTRIC
COMPANY *et al.*, *Appellants*.¹

MUNICIPAL CORPORATIONS — IMPROVEMENTS — CHANGE OF GRADE — BENEFITS — ELEMENT OF DAMAGES. In condemnation proceedings to ascertain the damages to abutting property from a change of street grade, the amount that such abutting property was assessed for the purpose of paying the cost of the work, as property especially benefited within the improvement district, is not an element of the damages sustained, and cannot be considered.

Appeal by defendant from a judgment of the superior court for King county, Mackintosh, J., entered October 17, 1912, awarding damages in a regrade condemnation proceeding. Affirmed.

James B. Howe and *Hugh A. Tait*, for appellants.

James E. Bradford and *William B. Allison*, for respondent.

MORRIS, J.—This proceeding was commenced by the city of Seattle to adjudicate the damages to be paid owners of abutting property upon the regrading of certain city streets. The Seattle Electric Company was the owner of certain lots involved in the improvement, and at the trial it was agreed that its damages because of the cost of building a necessary bulkhead would be the sum of \$5,000, in which the city consented verdict should be returned. Appellant contended it was entitled to another element of damage, and offered to prove that the regrade had been accomplished and a local improvement district created by ordinance for the purpose of creating a fund to pay the cost of the work, and that for this purpose the property of appellant had been assessed in the sum of \$3,822.60. The lower court sustained the city's

¹Reported in 133 Pac. 8.

objection to including this assessment as an element of damage, and the electric company appeals.

The lower court, in our opinion, must be sustained. In levying an assessment for a local improvement the city is not acting under authority of any eminent domain statute, but such assessment, while not strictly speaking a tax, is in the nature of a tax, and the power to levy it is derived by the municipality under its sovereign power of taxation. Under this power, these assessments are levied upon the theory of a special benefit to the property assessed by reason of the improvement. The city not only assumes a benefit to the property, but fixes, and by proper proceedings levies, the amount of that benefit against the property, and when the owner pays the assessment he is, in contemplation of law, paying for a benefit to his property. In determining the damages to be paid when the city proposes to change the grade of the street under its right of eminent domain, the purpose of the inquiry is to ascertain the cost or damage to the owner to accommodate his property to the changed situation, irrespective of the power vested in the city to levy an assessment against the property because of the benefits flowing from the improvement. Under the provisions of our constitution, the city cannot confer that benefit upon the property until it first ascertains and pays the damages suffered by the property. In other words, before the owner can fully avail himself of the benefit to his property, he will be put to certain expense in adapting his property to the changed condition which is in law a damage. This damage the city must pay him before it can confer the benefit upon him. Having fully compensated the owner for the damage he must suffer in availing himself of the benefit conferred upon him, the city has the right to collect the assessment representing that benefit. To accept appellant's contention would make the city pay both the damage and the benefit, which cannot be supported under any theory of law. The owner must pay for his benefit by way

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Syllabus.

of assessment upon his property, and the city must pay the damage caused the owner in conferring that benefit.

The judgment is affirmed.

ELLIS, FULLERTON, and PARKER, JJ., concur.

[No. 10921. Department Two. June 28, 1913.]

JOSEPH JOHNS, *as Receiver etc., Appellant*, v. WILLIAM B. COFFEE *et al., Respondents*.¹

CORPORATIONS—STOCK—SUBSCRIPTIONS—FRAUD. The fact that a subscriber to capital stock gave his note and assigned stock to an existing corporation by name, does not estop him from asserting that his subscription was fraudulently induced by representations that the company was to be subsequently formed by certain persons in whom he had confidence.

APPEAL—REVIEW—FINDINGS. Findings upon directly conflicting testimony will not be disturbed on appeal where the evidence does not preponderate against them.

CORPORATIONS—STOCK—SUBSCRIPTIONS—FRAUD—LIABILITY TO CREDITORS. Where a stockholder was induced to subscribe for stock by the fraudulent representations of the corporation, and promptly rescinded, he is not liable to creditors for the balance due upon the stock, as he is himself a creditor and stands on an equal footing with other creditors.

SAME — STOCK—SUBSCRIPTIONS — FRAUD—LACHES. Where a subscriber inquired of the vice president and agent and was informed that he was subscribing to a corporation to be thereafter formed by certain men, neither the corporation nor its receiver can complain that he was guilty of laches in not ascertaining the falsity of the representations.

SAME—STOCK — SUBSCRIPTIONS—FRAUD — RESCISSION—DEFENSES. Upon the rescission of a stock subscription for fraudulently representing that the corporation was to be formed and controlled by certain men, it cannot be shown in defense that other stock of equal value was issued to the subscriber.

CORPORATIONS—INSOLVENCY—EVIDENCE. The insolvency of an insurance company is not established by the fact that it was in need

¹Reported in 133 Pac. 4.

of ready money to meet its fire losses, and had no way of proceeding except by calling in its stock subscriptions, upon which only one-half had been paid.

CORPORATIONS—STOCK—SUBSCRIPTIONS—FRAUD — RESCISSION—NOTICE. Where a stock subscription was induced by the fraud of the corporation, rescission may be effected by timely notice to the officers, without taking steps to withdraw from the list of stockholders, as against subsequent creditors who did not deal with the corporation on the faith of the subscription list, and had no knowledge thereof.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered October 28, 1912, upon findings in favor of the defendants, in an action on unpaid stock subscriptions. Affirmed.

Burkey, O'Brien & Burkey, for appellant.

B. S. Grosscup and W. C. Morrow, for respondents.

FULLERTON, J.—In February, 1909, the Pioneer Fire Insurance Company was incorporated under the laws of the state of Washington as a domestic fire insurance company. Its articles of incorporation located its principal place of business at Seattle, Washington, and fixed the amount of its capital stock at \$200,000. On May 25, of the same year, and before it attempted to transact any insurance business, it filed supplemental articles of incorporation increasing its capital stock to \$1,000,000; the stock being divided into 10,000 shares, of the par value of \$100 each. Of these shares, the incorporators subscribed for 975, agreeing to pay therefor at the rate of \$150 per share, and did pay into the treasury of the corporation, either in cash or securities taken for cash, one-half thereof, or \$75 per share. In the month of June, 1909, the company was examined by the state insurance commissioner and granted a certificate authorizing it to write fire insurance within the state of Washington from and after July 1, 1909. In August, 1909, further supplemental articles of incorporation were filed changing the principal place of business of the corporation from Seattle, Washington, to Tacoma, Washington, and its offices were at once

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moved to the Equitable building in the latter city, where they remained until the appointment of a receiver, as hereinafter stated. After the removal of the corporation to Tacoma, an effort was made to induce the citizens of that place to purchase shares of stock in the corporation, and among others, the respondent William B. Coffee was induced to subscribe for 40 shares thereof, his contract of subscription being as follows:

	Pioneer Fire Insurance Company
No. 67	Par Value \$100
	Stock Subscription
Shares 40	Subscription Price, \$150 per share

I, the undersigned, hereby subscribe for forty shares of the capital stock of the Pioneer Fire Insurance Company, of Tacoma, Washington, and I promise to pay for the same at the rate of One Hundred and Fifty Dollars (\$150) per share, \$100 whereof shall be credited to capital stock and \$50 to the Surplus Fund and I agree to pay on account of this subscription the sum of Seventy-five Dollars (\$75) per share, of which amount \$50 per share is to be credited to capital stock and \$25 per share to surplus.

Wm. B. Coffee,

P. O. Address, 1012 A. St.

Dated this 2nd day of Nov., 1909.

In settlement of the amount immediately due, Coffee gave his promissory note for \$2,000, and agreed to assign to the insurance company certain capital stock of the par value of \$1,000 which he held in another corporation, but which was not at that time fully paid up; Coffee agreeing in the contract of assignment to pay the balance due thereon as it matured, and when fully paid to turn the stock over to the insurance company. The company early got into financial difficulty, and on August 18, 1910, the board of directors passed a resolution making a call upon all of the subscribers to the capital stock for the balance due thereon. The formal notice of the call was given by the secretary on September 27, 1910. On August 23, 1910, five days after the call was made, an informal meeting of directors and stockholders of the company was held at Tacoma, at which meeting Mr. Coffee attended.

At this meeting, the affairs of the company were fully gone over. From what he learned at this meeting, Mr. Coffee conceived that he had been deceived and fraudulently induced to make a subscription to the capital stock of the insurance company, and immediately thereafter served a notice upon the company that he rescinded and repudiated his contract of subscription and demanded the cancellation thereof and the return of the same to him, together with the sums he had paid on account of the subscription. This notification and demand was in writing, and in it the respondent demanded that the insurance company be placed immediately in the hands of a receiver and its affairs wound up without further attempt to do business or the incurrence of further indebtedness. The company, however, continued as a going concern until March, 1911, when a receiver was appointed over it at the suit of creditors. In the meantime it had greatly increased its indebtedness.

This is an action brought by the receiver to recover on the unpaid balance of the respondent's subscription. The complaint is in the usual form in such cases. The respondent answered, and among other defenses, set up that he had been induced to subscribe to the capital stock of the corporation by fraud and deceit practiced upon him by the corporation's agent and vice president. A reply was filed putting in issue this allegation of the answer, and afterwards a trial was had on the issues thus made, by the court sitting without a jury. The court determined the issues in favor of the respondent, and entered judgment in his favor. From this judgment, the receiver appeals.

The particular fraud and deceit which the court found had been perpetrated upon the respondent was that he had been induced to enter into the written contract of subscription by the false representations of the insurance company's agent to the effect that the subscription was to the capital stock of a fire insurance company thereafter to be formed by the subscribers to such capital stock, among whom were certain men

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of the city of Tacoma whose names were furnished the respondent, and who the respondent well knew to be men of repute and standing in the community and of good business and financial ability, and concealed from him the fact that the corporation had then been organized and was then controlled and would thereafter continue to be controlled by men strangers to the respondent, and not by the men named to him and in whose business ability and integrity he had confidence; further finding that the respondent would not have entered into the contract of subscription had he been made aware of the true state of the matter.

The appellant assails this conclusion of the trial court on a number of grounds, the first of which is that the finding is contrary to the weight of the evidence. On this question we find the facts found by the court are testified to by the respondent and denied by the agent, with but little else in the record that seems to us to lend support to the testimony of either party, although much is pointed out in the record that it is thought to do so. It is claimed, on the part of the appellant, that a certain letter of introduction was handed the respondent by Marsh, when the respondent was first approached, which recited the fact of the insurance company's organization and incorporation, but the contention rests wholly on the evidence of Marsh, and is denied by the respondent. Again, it is said that Marsh testified that he solicited insurance from the defendant at the time he solicited his subscription to the capital stock, and that this statement is not denied by the respondent; also that Marsh testified that he showed the respondent a list of the officers and directors of the company and that his (Marsh's) name was included therein as such an officer, and that this statement is not denied by the respondent. It is probably true that the respondent did not specifically negative these statements in his testimony, but his testimony amounts to a denial of them in substance and effect. He states what did occur between Marsh and himself

at the time the subscription contract was signed, and testifies to facts which could not be true if the statements of Marsh are true. In other words, the respondent gave one version of the transaction and Marsh another and contradictory version, and a particular statement by either party cannot be taken as admitted because the other did not specifically negative it. Again, in his letter of rescission, prepared by his then counsel, the respondent makes recitals which are claimed to show that he knew at the time he made the subscription that the company was incorporated and that Marsh was an officer thereof. But we do not so read the letter. Unquestionably it shows that he knew when the letter was written that the company had been organized prior to the time he made the contract of subscription, but this was some months after that event, and after he had attended the informal meeting of stockholders where he was made acquainted with the actual facts.

Our attention is also called to the fact that the note given by the respondent in part payment for the stock was made payable to the "Pioneer Fire Insurance Company, a corporation," and the assignment of stock was made to the same company, and it is argued that this not only shows knowledge on the part of the respondent at that time of the existence of the corporation, but estops him to deny that he then knew of its corporate existence. Answering the legal question suggested, it is enough to say that the respondent does not deny the then existence of the corporation; he denies only that he knew of its existence, and the rule of law suggested does not estop him from making this denial. As to the question of fact thought to be established by these writings it must be remembered that they are no more definite in respect to the person to whom they are payable than is the subscription contract itself, and while it may be that the fact might suggest an inquiry in the mind of a more prudent person, or a person better versed in the law, than was the respondent, the failure of the respondent to observe the incongruity, does not necessarily

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convict him of bearing false witness. The circumstances that are thought to support the respondent we shall not review. It is sufficient to say that, since the trial court found with the respondent, and since we are not able to find that the testimony preponderates against its conclusion, we are constrained to follow that conclusion and hold that the respondent was induced to make his subscription through the deceit and fraud of the corporation.

It is next said that the respondent could readily have obtained knowledge of the facts of which he now pleads ignorance by inquiry, and hence must be held to be guilty of laches if he failed to make such inquiry. But the respondent did inquire concerning the matters of the corporation's vice president and agent, and was told that he was subscribing to the capital stock of a corporation thereafter to be formed. This being true, it is manifest that the corporation itself cannot be heard to complain in this regard. Nor do we perceive wherein the receiver, as the representative of the creditors, has superior rights. Since the respondent was deceived by the corporation and induced by such deceit to make an investment which he otherwise would not have made, and which has proved a total loss, his equities are equal to the creditors, and he should not be made to contribute to their advancement.

Again it is said that the respondent is not injured by the fraud and deceit attributed to Marsh even though it be conceded that he was so deceived. It is somewhat difficult to follow the argument advanced to support this proposition, but it seems to be that, inasmuch as the corporation to whose stock the respondent actually subscribed was under the control of the very persons whom the respondent expected to control the corporation he anticipated would be formed, it is not to be presumed that the new corporation would have met with any better financial success than the existing one. But we cannot agree with the fact here assumed. As we read the record, the great bulk of the capital stock of the corporation was, until after the time the respondent rescinded his purchase, in

the hands of the original promoters of the scheme, and that they exercised the control and management of it until long after that time, until in fact the company became so hopelessly insolvent that nothing could be done with it except to wind up its affairs with as little loss as possible. Moreover, the argument in itself is not sound. If the respondent contracted to purchase particular stock, the contract is not fulfilled by assigning to him other stock of equal value. A vendor may sometimes be permitted to show in mitigation of damages that, in the performance of a contract to deliver a specific article, he delivered something just as good as the specific article, but he is never permitted to make such a showing as a fulfillment of the contract.

It is next contended that the attempted rescission of the contract to purchase the shares of stock was ineffectual, and the first reason suggested in its support is that the corporation was insolvent at the time. But without listing in detail its then debits and credits, we think it too much to say that it was then insolvent, if it had ever been a solvent concern. It is true the corporation was then in need of ready money to meet the accumulating fire losses, and seems to have had no means of procuring it other than by calling in the balance due upon its stock subscriptions, one-half of which only had then been paid. But this was not necessarily insolvency, and the concern still had the approval of the state insurance commissioner. At any rate, its condition financially seems to have been no worse at that time than it was when the respondent made his stock subscription.

It is further argued that the mere giving notice of rescission to the corporate officers is not in itself sufficient to accomplish a rescission, but that some action should have been taken by the respondent to have his name stricken from the stockholders' list in order to make the notice effectual. A number of English cases are cited as supporting this rule, but they seem to have been grounded upon particular provisions

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of the English statutes not found in our own. The general rule, as adopted by the American cases, is thus stated by Mr. Thompson:

“Where a subscription has been procured by fraud, and the subscriber has taken timely steps, as elsewhere pointed out, to rescind the subscription, he is not then compelled to resort to equity to have the contract judicially annulled; but he can wait until the corporation brings an action to enforce the subscription, and set up the fraud as a defense.” Thompson, *Corporations* (2d ed.), § 740.

No different rule should be applied, we think, merely because the action was delayed until after the corporation had gone into the hands of a receiver. If the respondent had a defense against a suit to recover on the unpaid balance by the corporation itself, he had a like defense against a suit by the receiver of this corporation; unless of course he has committed some affirmative act subsequent to serving his notice of rescission which would estop him from making the defense, such as inducing others to become creditors of the corporation on the faith and belief that he was a stockholder therein. No mere delay on his part will work that result. Here there is nothing to show that any of the persons the receiver represents became creditors of the corporation on the faith of the belief that the respondent was a stockholder therein. On the contrary, it is not shown that any of them ever knew he was such a stockholder until the books were searched after the corporation's insolvency.

Mr. Justice Miller in his dissenting opinion in *Upton v. Tribilcock*, 91 U. S. 45, used this language:

“I am of the opinion, that, where an agent of an existing corporation procures a subscription of additional stock in it by fraudulent representations, the fraud can be relied on as a defense to a suit for the unpaid installments, when suit is brought by the corporation; and that if the stockholder has in reasonable time repudiated the contract, and offered to rescind before the insolvency or bankruptcy of the cor-

poration, the defense is valid against the assignee of the corporation."

So, also, the supreme court of Virginia:

"The authorities are abundant in support of the general rule that a person fraudulently induced by an agent of a corporation—and a promoter is an agent—to subscribe to its capital stock, may, at his option, repudiate the contract; and a fraud may consist as well in the suppression of what is true as in the representation of what is false. Indeed, the law is that where the person solicited to subscribe has no other information on the subject than that which the agent chooses to convey, the statements of the agent ought to be characterized by the utmost candor and honesty. 1 Cook, Stock, Stockh. and Corp. Law (3d ed.), sec. 147; *Crumpp v. U. S. Mining Co.*, 7 Gratt. 352; *Bosher v. R. & H. Land Co.*, 89 Va. 455; *Directors etc. v. Kisch*, L. R. 2 H. L. App. Cas. 99." *Virginia Land Co. v. Haupt*, 90 Va. 533, 19 S. E. 168.

In the foregoing discussion, we have noticed only what seems to us to be the principal reasons advanced by the appellant in support of his contentions, as to follow the argument, seriatim, would extend this opinion to an undue length. It is enough to say, therefore, that we have examined the arguments of the receiver with care, and find nothing that in our judgment warrants a reversal of the judgment entered by the trial court.

The judgment is affirmed.

MORRIS, ELLIS, and MAIN, JJ., concur.

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[No. 11157. Department One. June 28, 1913.]

THE STATE OF WASHINGTON, *on the Relation of Edwin A. Voris, Respondent, v. THE CITY OF SEATTLE et al., Appellants.*¹

MUNICIPAL CORPORATIONS—OFFICERS AND EMPLOYEES—CIVIL SERVICE—POWER TO ABOLISH OFFICE. The abolishment of an office with several others in order to reduce the force in the interests of economy and combine the duties of several offices is not a removal from office, within the civil service rules; and hence an ordinance abolishing an office is not invalid in that the duties of the office still remained and another ordinance provided that they should be performed by a clerk engaged a part of his time in other work.

SAME—POWER TO ABOLISH OFFICE. The courts cannot inquire into the motives of a city council in abolishing an office within the civil service rules, if the ordinance is fair on its face and does no violence to any provisions of the charter or law.

SAME—GOOD FAITH. An ordinance abolishing an office in order to reduce the force is not shown to have been passed in bad faith by the fact that the clerk upon whom the duties devolved received an increase in salary and was not able to keep up with his work, nor by testimony tending to show that the head of the department affected acted in bad faith; especially where the ordinance at the same time abolished four other positions and reduced the working force by five men.

Appeal from a judgment of the superior court for King county, Smith, J., entered February 14, 1918, upon findings in favor of the relator, in a proceeding to try title to office. Reversed.

James E. Bradford and *William B. Allison*, for appellants.

Preston & Thorgrimson and *Sanford C. Rose*, for respondent.

CHADWICK, J.—The trial judge filed a memorandum decision in this case. He found the facts to be as follows:

“In May, 1911, there occurred a vacancy in the office of the city comptroller for the place of real estate clerk, a

¹Reported in 133 Pac. 11.

position recognized by classification under the civil service system. An emergency having arisen, relator Voris was appointed by the comptroller pending civil service regulations. In June, upon investigation by the secretary of the commission of the duties required for the position of real estate clerk, it was classified as that of abstractor and real estate clerk, and the comptroller notified that an original examination must be held for the position. Relator in November having successfully passed the examination, received the regular appointment of file and real estate clerk, which seems to be another designation of abstractor and real estate clerk. On April 30, 1912, the city council, by Ordinance 29343, ordained that the position of file and real estate clerk in the department of city comptroller be abolished, and on the same day the comptroller reported to the commission the separation of Voris from his department, alleging the cause to be on account of the reduction of force. On May 6th, 1912, the council, by Ordinance 29380, established the salary of detail clerk in charge of index and real estate record work at \$100 per month. Thereupon the commission notified the comptroller that, inasmuch as a separate classification had been provided for this position, the work should be done by none except those regularly qualified for the same. The comptroller, ignoring the communication, notified the commission June 7th that he had given the increase of salary made by Ordinance 29380 to R. F. Farren as detail clerk. On June 29th Voris appealed for investigation by the commission of the reasons for his dismissal. Such investigation was had, and on September 26th, 1912, the commission found Voris entitled to the office held by Farren, and recommended that he be returned to the position as the employee rightfully entitled to the same. The comptroller having refused to comply with the recommendation of the commission, relator Voris has brought this action."

It may be inferred from this statement that the position occupied by the relator was the only position abolished by the council. This is not true. The ordinance of which he complains abolished several positions and the new ordinance seems to have been designed to combine their several duties with that of others. From these facts, the court concluded that the office in which the relator had been employed had

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been abolished in name only, and that the relator was entitled to reinstatement, with his salary from the time of his separation from the office. The question put by the trial judge is, Was the office abolished? It is not denied that the city council has the power to abolish a position, but it was the opinion of the court below, and is the opinion of counsel for the relator, that the council could not declare an office abolished unless "in fact the duties themselves were abolished":

"The testimony before the court clearly established the existence of the duties as formerly, but their transference to another clerk. Owing to varying changes of conditions the duties at times have been more or less numerous than formerly, but there is no dispute of the fact that the same duties of the alleged abolished position remain to be performed and still continue to occupy another clerk from one-half to two-thirds of all his time."

We think the court has gone further than the law warrants. The council has the right to create offices and it may abolish them, or it may, in the interest of economy and efficiency, combine the work of several employees so that their duties will be thereafter performed by a lesser number of men. In this case the city council has done no more than this. It abolished the position of "file and real estate clerk" and by another ordinance provided that the work formerly done by that employee should be done by "a detail clerk in charge of index and real estate record work in clerk's division." The testimony, and most of it is in our opinion irrelevant, shows that Farren, the present employee and a civil service man, is doing a part of his old work as well as the work formerly done by Voris. Relator undertook to show that he was not keeping up with his work. That is a matter with which courts have nothing to do. So long as he is performing, either in whole or in part, the work that he formerly did, his right to remain in the office of the comptroller is greater than is the right of the relator to be reinstated. An employee cannot be removed to make way for one who is in the same legal position. In other words, the work formerly done by

Voris being combined with that formerly done by Farren, neither the civil service commission nor the courts have power to say that a present employee shall give way to one who insists upon the right to perform a part only of the present duties of the existing position.

In the instant case, the object of the ordinance was to work a reduction of the force. We are informed by counsel, on oral argument, that there was an actual reduction under the ordinance complained of, of five men. We may assume that this could only be done by combining the work previously done by the greater number, and this the council had a lawful right to do under its general powers, as defined in §§ 18, 19 and 41, art. 4 of the charter.

Much of the brief of the respondent is taken up with a discussion that goes to the good faith of the city council in abolishing this office. Courts will not inquire into the motives of the legislative body. If the ordinance or law is fair upon its face and does no violence to any provision of the city charter or the constitution, it will be upheld. This ordinance is fair upon its face. It suggests nothing unless it be a purpose to work economy. If the rule were otherwise, it would be impossible for the governing body of a city to change, rearrange, or redefine the duties of its employees, so long as any one of them had been classified by the civil service commission and had a scintilla of work to perform.

The case of *Fitzsimmons v. O'Neill*, 214 Ill. 494, 78 N. E. 797, is a valuable authority in that it deals with a case similar to the one at bar and reviews many authorities. A foreman in the city repair shop was laid off for the reason that no appropriation had been made to meet his salary. He demanded reinstatement, contending that the duties of his position had not been abolished, and could not be abolished, as it was essential to the proper management of the repair department that there should be a superintendent. It was further made to appear that the duties which had been performed by him were performed by others; that those who

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had been doing the work were not superintendents; that one of them was a wagonmaker and the other a laborer. Relator insists that the work of real estate clerk must be done by an abstractor, and that Farren was never qualified as such. The case is a stronger one than is this, for the reason that it is alleged "that neither of these men, while performing duties formerly performed by the petitioner, performed the duties pertaining to their former position, but devoted their entire time to the duties formerly done by petitioner." In all things the right to reinstatement is based on the same grounds as the relator sets up in his petition. It was held that the plaintiff in that case could not reinstate himself. It was contended there, as here, that the removal was illegal, but the court held that the civil service rules do not apply to a case where the incumbent is dismissed for want of funds, or in order to reduce expenses.

In *Phillips v. Mayor etc. of New York*, 88 N. Y. 245, a clerk of the fire department of the city was discharged, not for any personal reason, but because it was necessary for the department to conform its expenses to a smaller appropriation, thus necessitating a reduction of the clerical force. It was held that the civil service rules did not apply; that it was not a case of removal within the meaning of those rules. The court said:

"He [plaintiff] could not claim that the office or clerkship should be retained for his benefit, and the fire commissioners were not obliged to consult him before abrogating it."

In *Langdon v. Mayor etc. of New York*, 92 N. Y. 427, a clerk in the financial department of the city was separated from the service and his removal was sustained as not in violation of the civil service rules, for the reason that "the business of the department had so diminished that the plaintiff's services were not needed." In *People ex rel. Corrigan v. Mayor etc. of Brooklyn*, 149 N. Y. 215, 43 N. E. 554, speaking of the civil service statutes, the court said:

“While these statutes are positive in form, it is clearly not their intent to give to occupants of such positions a life tenure where upon grounds of economy or for other proper reasons the office or position is in good faith abolished.”

A case which we conceive to be more in point is that of *People ex rel. Hartough v. Scannell*, 48 App. Div. 445, 62 N. Y. Supp. 930. The relator, a civil war veteran, was employed as “an inspector of fire hydrants.” He was discharged, and duties similar to those theretofore performed by him were performed by persons who were not veterans. The court found the real question to be: “Whether . . . the fire department had the right to abolish the position held by the relator without notice and hearing, so long as other laborers, not veterans, were retained in the service.”

“We are thus left to the question whether the position which the relator had was abolished in good faith and for reasons of economy. This was a question of fact. It appears that 16 other veterans, occupying positions similar to that of the relator, were removed in January, 1898, and that there was evidence tending to show that this was done so as to bring about uniformity in the rules and method of inspecting fire hydrants over the entire city by extending over Brooklyn and Queens the rules which had been in existence for many years in the old city of New York, the duty in the boroughs of Brooklyn and Queens being devolved upon the fire department instead of the water department, and that this was done from motives of economy. In such a change, standing alone, we can see no evidence of bad faith on the part of the commissioners.”

Judge Dillon finds the law to be:

“The *purpose of the civil service statutes* and of other laws prohibiting the discharge of employees without cause assigned, notice, and a hearing, is to insure the continuance in public employment of those officers who prove faithful and competent, regardless of their political affiliations. These statutes are not intended to affect or control the power of the city council or the executive officers of the city to abolish offices when they are no longer necessary or for reasons of economy. They are not intended to furnish an assurance to

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the officer or employee that he will be retained in the service of the city after the time when his services are required. They do not prevent his discharge in good faith without a trial and without notice, *when the office or position is abolished* as unnecessary or for reasons of economy. But although the operation of these statutes does not prevent the abolition of an office in good faith, the local authorities have no power to discharge an officer or employee of the city *upon the pretence* that his office is abolished and immediately thereafter assign another person to do the same work which has been done by the discharged employee. . . ." 2 Dillon, Municipal Corporations, 479.

See, also, *People ex rel. Moloney v. Waring*, 7 App. Div. 204, 40 N. Y. Supp. 275; *Caulfield v. Jersey City*, 63 N. J. L. 148, 43 Atl. 433; *In re Kelly*, 42 App. Div. 283, 59 N. Y. Supp. 30; *People ex rel. Nason v. Feitner*, 58 App. Div. 594, 69 N. Y. Supp. 141; 28 Cyc. 445, 594.

The council having the right to abolish the position occupied by relator, it would be an unwarranted usurpation for the courts to go beyond the question of the good faith of that body. We find nothing in the record to overcome that presumption of regularity and integrity which attends every act of a co-ordinate branch of the government. If there was anything proven that would challenge the good faith of the council, the fact that five positions were abolished in the ordinance which abolished the relator's position is a sufficient answer, and enough to sustain our holding that the motive of the council was pure and prompted by a disposition to work economy. It would certainly be harsh doctrine to hold that a city council cannot reduce the expenses of a department. As has been held, the council can abolish an office and refuse to make an appropriation to pay the employee. If this is so, it cannot be denied that the same power can combine two or more positions in one. We think this case is controlled by the authorities cited and commented upon. In passing, it may not be out of place to say that many of the cases to which we have referred grew out of departmental

orders, whereas we have had to deal with an expression of the law making body.

Nor do we find anything in *Gilmur v. Seattle*, 69 Wash. 289, 124 Pac. 919, or *State ex rel. Powell v. Fassett*, 69 Wash. 555, 125 Pac. 963; *Foster v. Hindley*, 72 Wash. 657, 131 Pac. 197, or *State ex rel. Cole v. Coates*, ante p. 35, 132 Pac. 727, that in any way qualifies our view of this case. Those cases are in line with the general rule laid down by Judge Dillon and admitted in all the cases we have cited. In the *Gilmur* case, the court found that the position had been changed only in name. The plaintiff was "a foreman of outside construction." The council passed a new ordinance creating the position of "foreman pole gang, such position being intended to cover the position then held by respondent, to wit, that of foreman of outside construction." The case was decided in favor of the plaintiff because "his duties remained the same after the passage of the second ordinance, and the title of his office is of no moment." If the relator in this case were reinstated, his duties would not be the same. He would have to take the place now occupied by Farren and perform additional duties. This fact distinguishes this case from the *Gilmur* case.

In the case of *Foster v. Hindley*, the employee of the city was dismissed from the services by the mayor, for the reason, as stated by that officer, that "the office that you now hold is discontinued." As required by the civil service rules, the mayor reported the cause of the separation to be "reduction of force." We held that the office was not discontinued; that the council, and not the mayor, had power under the charter to abolish offices. Here we have the act of a council with power "to modify or abrogate from time to time as the needs of the city shall require, all proper offices and bureaus, and to provide for the conduct and government of such offices and bureaus, and the appointment, removal, duties, and compensation of officers, . . ." The *Powell* case is so clearly without significance here that it needs no

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comment. The *Cole* case, as does the *Powell* case, holds that a civil service employee cannot be removed without cause, and further, that a change in the method of compensation, although under a different title, did not change the nature of the employment; that the right of employment is to be determined from the character of the service performed by the new employee as compared with the services which had been performed by the ousted employee. In the case at bar, the council, having authority so to do, has destroyed that standard of comparison. In a negative way that case sustains our present holding.

The supreme court of Illinois was called upon in *Fitzsimmons v. O'Neill*, *supra*, to distinguish a former decision. In the case of *Chicago v. Luthardt*, 191 Ill. 516, 61 N. E. 410, the court had held as we held in the *Gilmur* case. The court distinguished the earlier case, saying:

"There, the common council merely changed the name of the official but did not change his duties, and made an appropriation for the salary of the same office by another name. No such facts exist in the case at bar. The appropriation bill here did not designate the foreman of the repair shop by another name, nor appropriate any salary for his successor acting under another name."

That Farren, the present incumbent, has had an increase of salary and has not been able to keep up with his work, can have no bearing. These facts do not indicate bad faith. *People ex rel. Steers v. Department of Health of New York*, 86 App. Div. 521, 83 N. Y. Supp. 800. If the council errs in its judgment when it passes an ordinance combining two positions, the courts are powerless to correct the mistake. In the case just cited it is said: "If, in good faith, a department initiates a policy of enforced economy, but goes too far . . . that affords no reason for the reinstatement of a subordinate."

Nor does the testimony offered to show that the comptroller has acted in bad faith have any bearing. Whatever his design may have been, it is lost in the ordinance. Our con-

clusion is that the ordinance was passed in good faith and in the interest of economy, and not for the purpose of circumventing or evading the civil service act; that the function of the civil service commission, so far as the abolished position is concerned, has been performed. It may classify the present position and require an examination, but it cannot supplant a present employee of equal right to make way for one who claims under a position that is abolished. This court has been extremely liberal in upholding the powers of the civil service commissions of our cities. Notwithstanding the sentiment which sustains laws providing for classified civil service, there must be a limit to the right of such commissions to impose employees upon a city. A limitation is found in the power of the council to legislate, and in the right of the taxpayers to insist on economy in the administration of public affairs. This conclusion makes it unnecessary to discuss the remaining assignments of error.

The judgment of the lower court is reversed, and remanded with instructions to enter a judgment of dismissal.

GOSE, MOUNT, and PARKER, JJ., concur.

[No. 11133. Department One. July 1, 1913.]

THE STATE OF WASHINGTON, *on the Relation of David
Abrashin, Respondent*, v. ED. L. TERRY *et al.*,
Appellants.¹

TAXATION—SALES—REDEMPTION. Under Rem. & Bal. Code, § 7808, redemption from a tax sale to satisfy a local assessment must be made within two years after the sale and within 60 days after the publication of notice of demand for a deed.

PARTIES—NECESSARY PARTIES—DEMAND FOR A DEED. Objection that a married man cannot maintain an action to obtain a tax deed without joining his wife is waived where it is not raised by demurrer or answer, under Rem. & Bal. Code, §§ 261-263.

¹Reported in 133 Pac. 386.

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Opinion Per MOUNT, J.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered January 31, 1913, upon findings in favor of the relator, in mandamus proceedings. Affirmed.

Charles E. Patterson, James M. Gephart, James E. Bradford, and William B. Allison, for appellants.

William E. Froude and Higgins & Hughes (Hyman Zettler, of counsel), for respondent.

MOUNT, J.—This appeal is from an order of the superior court for King county requiring Ed. L. Terry, as treasurer of the city of Seattle, to execute and deliver to the plaintiff a deed for lot 8, block 7, Latona First addition to the city of Seattle.

There is no dispute upon the facts, which are as follows: On January 21, 1910, the city treasurer of Seattle duly sold to M. Abrashin the lot in question, to satisfy unpaid delinquent assessments against said lot duly levied in an eminent domain proceeding by the city of Seattle. On said date, the city treasurer issued to M. Abrashin a certificate of purchase for this lot. All the proceedings leading up to the issuance of that certificate were regular and in compliance with law. On November 23, 1910, M. Abrashin sold and assigned the certificate of purchase to David Abrashin, and he is now the owner and holder thereof. On March 2, 1912, and for three consecutive weeks thereafter, the relator herein published notice that he was the holder of the above mentioned certificate, that unless redemption was made within sixty days from the date of the first publication, relator would demand a deed for said property from the city treasurer of Seattle. This notice was directed to the owner of said property and was regularly published in a weekly newspaper published in the city of Seattle. The owner of the property, Mr. George C. McKee, was a nonresident of the state of Washington. He resided in Chicago, state of Illinois. The relator paid all taxes and special assessments on said prop-

erty and all interest, penalties and charges thereon levied prior to and subsequent to the said sale, and on May 11, 1912, after having published the notice above referred to, he filed the same with the city treasurer, together with proof of publication thereof and an affidavit showing that service of said notice had been made by publication, that all taxes and assessments on said property had been paid, and that he had demanded of the treasurer a deed for the property above described. No redemption was made prior to the date of the first publication of the notice, nor for sixty days thereafter. On May 11, 1912, after the demand had been made as aforesaid, after the treasurer had ascertained that all proceedings relating thereto were regular, and after he had prepared a deed but prior to signing the same, the defendant, George C. McKee, tendered to the city treasurer the sum of \$245.43, being the total amount due for the redemption of said certificate of purchase and attempted to redeem the property from the sale. The treasurer thereupon issued a purported certificate of redemption for said property. This action was then brought to require the city treasurer to deliver to the relator a deed for the property.

Appellants present two questions: First, where property has been sold by a city treasurer for delinquent local assessments, can a redemption be made by the owner after two years from the date of the sale, and after the holder of the certificate of purchase has given sixty days' notice by publication of his intention to apply for a deed and has fully complied with the law and demanded a deed; and, second, can the relator, being a married man, maintain this action without joining his wife as relator?

Upon the first question, the statute provides as follows:

"Every piece of property sold for an assessment shall be subject to redemption by the former owner, or his grantee, mortgagee, heir or other representative at any time within two years from the date of the sale upon payment to the treasurer for the purchaser of the amount for which the same was sold, with interest at the rate of fifteen per cent

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per annum, together with all taxes and special assessments, interest, penalties and charges thereon paid by the purchaser of such piece of property since such sale, with like interest thereon. Unless written notice of taxes and assessments subsequently paid, and the amount thereof shall be deposited with the treasurer, redemption may be made without including the same. On any such redemption being made, the treasurer shall give to the redemptioner a certificate of redemption therefor, and pay over the amount received from such redemption to the purchaser or his assigns. Should no redemption be made within said period of two years, the treasurer shall, on demand of the purchaser or his assigns, and the surrender to him of the certificate of purchase, execute to such purchaser or his assigns, a deed for the piece of property therein described: Provided, that no such deed shall be executed until the holder of such certificate of purchase shall have notified the owner of such piece of property that he holds such certificate, and that he will demand a deed therefor; and if, notwithstanding such notice, no redemption is made within sixty days from the date of the service or first publication of such notice, said holder shall be entitled to said deed. . . ." Rem. & Bal. Code, § 7808 (P. C. 171 § 111).

It is argued by the appellants, in substance, that the purchaser at the tax sale acquires a mere lien upon the property, and that he does not acquire title to the property until the delivery of the deed, and that if redemption is made at any time before the deed is executed and delivered, such redemption is within time. The statute, however, is clear to the effect that the redemption must be made within two years, and if no redemption shall be made within said period of two years, the treasurer shall, on demand of the purchaser, execute to said purchaser or his assigns a deed for the property therein described: Provided, that no such deed shall be executed until the holder of such certificate of purchase shall have notified the owner of such piece of property that he holds such certificate and that he will demand a deed therefor, and if, notwithstanding such notice, no redemption is made within sixty days from the date of the first publication

of such notice, said holder shall be entitled to said deed. In other words, the owner's right to redeem is cut off when two years have expired and when sixty days' notice has been given and a demand for a deed has been made and the certificate has been surrendered and when the taxes and assessments have been paid. In this case, the two years' period had expired before the notice was published. The owner thereby had sixty days' additional time within which to make redemption. After this notice was given to the owner, and after no redemption had been made within the time provided therefor, and after the treasurer was satisfied that all the requirements of the law had been complied with, it was his duty to execute and deliver the deed. In short, in this case it was shown conclusively, and is not disputed, that the two years' limitation had expired and that the sixty days' limitation had expired and that the deed had been issued but had not been signed and delivered when the attempted redemption was made. The holder of the certificate, therefore, had done all that he was required to do and he thereby became the owner of the title and was entitled to his deed. We see no escape from this conclusion. The law as stated by Jaggard on the Law of Taxation, pp. 488-490, is as follows:

"The state has power to sell land for taxes absolutely. Whatever privilege of redeeming it may grant is of grace; it is not a right the delinquent taxpayer is entitled to demand. Accordingly, redemption must, in all essential respects, conform to the statute which permits it. . . .

"The time for redemption is fixed by statute. 'The person having a right to redeem must avail himself of the right during the time fixed by statute.' The time as so fixed is absolute. It does not depend on the discretion of the law courts within the limits so determined, or the conduct of any public official, or a misrecital in a deed."

In Black on Tax Titles (2d ed.), § 350, the rule is stated as follows:

"At the same time it is very necessary to remember that the right of redemption from tax sales is a purely statutory

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right. It is an act of grace, a privilege, not founded upon any principles of inherent justice or of the common law. Hence the construction of the statutes can never be strained so far as to excuse an actual failure of compliance with the positive directions of the law. Whatever steps the law marks out for the party seeking to redeem, these he must scrupulously follow. . . .”

To the same effect see: *Pearson v. Robinson*, 44 Iowa 413; *Stewart v. White*, 19 Idaho 60, 112 Pac. 677; *Pollen v. Magna Charta Min. & Mill Co.*, 40 Colo. 89, 90 Pac. 639. It is apparent, therefore, that the attempted redemption came too late, and it was the duty of the city treasurer to sign and deliver the deed which had been issued.

It is next argued that the relator is not authorized to maintain this action because he was a married man and his wife did not join in this action. This point was not raised until the evidence was closed and upon the final argument at the trial below. The point not having been raised in time to be met by the respondent, must be taken as waived. The point was neither raised by demurrer nor by answer. It was therefore not raised in time. Rem. & Bal. Code, §§ 261-263 (P. C. 81 §§ 229-233).

The judgment of the trial court was right and is therefore affirmed.

CHADWICK, GOSE, and PARKER, JJ., concur.

[No. 10927. Department Two. July 1, 1913.]

H. M. TAYLOR *et al.*, *Appellants*, v. G. EWING *et al.*,
Respondents.¹

CONTRACTS—CONSTRUCTION—EVIDENCE—SUFFICIENCY. A settlement agreement between a failing debtor and a trustee for creditors whereby the trustee agreed to get assignments of the claims, held, on conflicting evidence, to cover only merchandise claims, where the debtor's attorney objected to the only claim other than merchandise claims as having been paid and being "for rent."

CONTRACTS—PERFORMANCE OR BREACH. A settlement agreement between a failing debtor and a trustee for creditors whereby the trustee agreed to secure assignments of all merchandise claims, is substantially performed, where it appears that there were claims of more than forty creditors residing in many states aggregating \$12,000, and assignments were procured of all claims except one for \$366.67 which was procured by wire during the progress of the trial, and one for \$48 the amount of which was tendered and paid into court.

CONTRACTS—MUTUALITY. A settlement agreement between a failing debtor and a trustee for creditors is not lacking in mutuality, where it appears that it was agreed that the trustee should obtain assignments of the merchandise claims, and that pending bankruptcy proceedings should be dismissed and the debtor put in possession of the stock of goods, which was done.

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered September 20, 1912, upon findings in favor of the defendants, in an action on contract, tried to the court. Reversed.

McClure & McClure, Arthur McGuire, and Walter S. Osborn, for appellants.

W. J. Canton and A. J. Hensel, for respondents.

MAIN, J.—The purpose of this action is to recover the possession of, and a judgment upon, a promissory note.

The facts are substantially as follows: During the early part of the year 1911, one R. G. Ewing was, and for some

¹Reported in 132 Pac. 1009.

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time prior thereto had been, engaged in the mercantile business, at Withrow, Washington. Becoming financially embarrassed, he executed and delivered to his father, G. Ewing, a chattel mortgage upon his stock of merchandise. Sometime during the month of February of that year, action to foreclose the mortgage was begun, and the store was taken possession of by the sheriff. In the United States district court for the Western District of Washington, bankruptcy proceedings were pending against R. G. Ewing, and a sale under the foreclosure action was enjoined. In addition to the debt to his father, which was secured by the chattel mortgage, he owed numerous creditors who had sold him merchandise. The debts to these various merchandise creditors approximated \$12,000. The plaintiffs, Taylor & Dodd, at a meeting of the Seattle Merchants' Association, were appointed as trustees to go to Withrow for the purpose of effecting some adjustment or settlement of R. G. Ewing's affairs. On or about February 24th, after reaching Douglas county and negotiating with G. Ewing and his attorneys, Canton & Hensel, an oral agreement was entered into whereby G. Ewing was to deliver to the Douglas County Bank in escrow his promissory note in the sum of \$4,500, due October 1, 1911, with interest at 8 per cent per annum, and payable to the plaintiffs. The plaintiffs were to secure assignments to G. Ewing from the merchandise creditors of R. G. Ewing, and deposit such assignments in the bank above named; the bankruptcy proceedings were to be dismissed, and G. Ewing was to be permitted to take possession of the store. When the assignments of the merchandise creditors had all been delivered to the bank, the note was to be delivered to the plaintiffs in full payment of the \$12,000 merchandise indebtedness of R. G. Ewing.

Immediately after this plan of adjustment was agreed upon, and in pursuance thereof, the plaintiffs entered upon its performance. Before returning to Seattle, they examined the books and papers which had been kept in the store

for the purpose of obtaining a list of the creditors. Subsequently the names of other creditors were furnished to them by Canton & Hensel. Names of creditors were also procured through the agency of mercantile credit associations which exist in many cities. Frequent correspondence occurred between the plaintiffs at Seattle and Canton & Hensel at Waterville. On April 21st the bankruptcy proceedings were dismissed and the store was again opened by G. Ewing. From time to time as assignments were secured from the creditors, they were mailed to the Douglas County Bank. The following are excerpts from letters written by Canton & Hensel to the plaintiff Taylor, with the dates thereof:

April 28th: "We have all the claims except the Armour claim."

July 1st: "Will you please make a new assignment of all the claims of the creditors of R. G. Ewing to G. Ewing as of the date of July 8, 1911. This will take in the Armour claim over which we have so much trouble. Make your assignments general to cover all claims and this will settle everything."

The general assignment referred to in the above letter was executed under date of August 1st and sent to the bank.

July 29th: "We feel very relieved to have this matter closed up as it has been a very tedious affair to us and we desire at this time to assure you that we very much appreciate your businesslike efforts and your general conduct in adjusting this very knotty entanglement and that you have left friends where others would leave enemies."

Sept. 1st: "Yours of 8-28-11 to hand and note the two claims filed with you against the estate of R. G. Ewing. Will say that R. G. Ewing has O. K.'d the Douglas Hardware claim less the interest and has rejected the Cordelier claim. We do not understand why this was sent in. This fellow was paid some time ago in full, this claim being for rent. As to the Sterling Manufacturing Co.'s claim we got the necessary O. K. and filed it with the trustee upon the receipt of the letter with claim enclosed. The record that the bank has is exactly the same as that which you have. After filing the Douglas Hardware account, the total is \$11,875.83."

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Sept. 20th: "There has been three or four other firms writing Ewing about accounts they hold, all small, and we have instructed him to write them to assign their accounts and send them to you. Before we lift the escrow we want to be sure that all the creditors, or at least about all of them, turn their accounts over to you. . . . Now, Mr. Taylor, the recent rains have prevented the threshing of grain and delayed the marketing of same for about two weeks longer than usual and while if we are satisfied to lift the escrow on October 1st, we can certainly raise the cash to do so and want to do so if absolutely necessary."

Then follows a request for an extension of the note for a period of fifteen or twenty days. Subsequent to this, the correspondence shows that the plaintiffs repeatedly requested payment of the note, and Canton & Hensel repeatedly asked for further time. The matter not being settled, a letter was addressed directly to G. Ewing, and on February 3, 1912, he replied:

"I said you receivers had not gotten all the bills assigned (referring to a conversation) to me yet and I would like very much if you would get them all and have the matter settled. The note calls for all of the creditors. I have settled some of the accounts in order to keep out of litigation. I will not pay the \$4,500 note until the bills are all assigned, which they are not at the present time."

On Feb. 20, 1912, the plaintiffs wrote Canton & Hensel:

"While you may consider it 'nervy' on our part to suggest either to Mr. Ewing or his worthy representatives that they use a portion of their valuable time to assist us in getting in the legitimate claims against R. G. Ewing's business, I do not at all consider it so. In explanation of request made that he use his best efforts to forward these claims I can only say that I have received numerous letters from you indicating that there were other claims in existence against R. G. Ewing's estate which we have not received and assigned to Mr. G. Ewing, but although I have repeatedly requested you to give me the names of all such claimants, or any of them, you have persistently refused to divulge either their names or the character of their claims."

The matter not reaching a settlement, some time thereafter this action was begun. The defense was, (1) that the contract had been rescinded by notice to the plaintiffs; and (2) that all the claims not having been assigned, no action could be maintained upon the note. The defendants contended that notice of rescission had been given the plaintiffs by long distance telephone; and on the question of the claims, contended that the plaintiffs were to secure assignments, not only of the merchandise claims, but those of other creditors of R. G. Ewing as well.

The cause was tried to the court without a jury, and the court found that notice of rescission had been given, and also that the contract contemplated the assignment not only of the merchandise claims but of all claims. The court found that, at the time of the trial, there were three claims which had not been assigned, the Cordelier claim for rent amounting to \$135, the claim of the Washington Cracker Company, of Spokane, amounting to \$366.67, and the claim of the Garden City Tailoring Company, of Chicago, amounting to \$40.29. It was stipulated upon the trial that, in the event the plaintiffs recovered, they were entitled to an allowance of an attorney's fee in the sum of \$500. At the conclusion of the trial, the action was dismissed. The plaintiffs appeal.

The first question presented is: What was the understanding between the parties as to whether the appellants were to secure an assignment of the debts of R. G. Ewing other than the merchandise accounts? On this question, the oral evidence of the witnesses for the appellants and the respondents is in conflict; and if it were necessary that the finding rest upon the oral testimony alone, we would hesitate to disturb the holding of the trial court. The Cordelier claim for rent is the only claim other than the two merchandise claims which it was found had not been assigned. The letter of Canton & Hensel under date of Sept. 1, 1911, an excerpt from which is above quoted, written prior to the time any controversy arose, demonstrates that the appel-

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lants' position as to the claims other than the merchandise claims must be sustained. It was there said, that the Cordelier claim had been rejected and that they did not understand why it had been sent in as it had been paid in full, "this claim being for rent." If the appellants were to get assignments of claims other than those for merchandise, why should this letter refer to the Cordelier claim as being one for rent in connection with its rejection?

The respondents' second contention is that the appellants could not maintain an action upon the note until all of the merchandise claims were assigned and delivered to the bank; and that, inasmuch as the claims of the Washington Cracker Company and the Garden City Tailoring Company had not been assigned, the action must fail. There can be no question but that the appellants exercised the utmost good faith in their endeavor to carry out the contract and to secure all of the merchandise claims. During the trial, the assignment of the claim of the Washington Cracker Company was secured by wire, and cash to the amount of the Garden City Tailoring Company's claim was tendered and deposited in the registry of the court. Taking into consideration that there were more than forty merchandise creditors, located in numerous towns and cities, with claims aggregating a total of approximately \$12,000, and that they were all obtained and assigned with the exception of the two mentioned, we think there was a substantial compliance with the contract. The respondents are in no way prejudiced because two of the claims were not assigned before suit was instituted. Consequently they have no just ground to complain. In cases of this character the rule is that substantial performance is all that the law requires. The plaintiffs were therefore entitled to maintain their action. In § Page on Contracts, § 1385, the rule is stated thus:

"The original common-law rule required a strict and literal performance as a condition precedent to recovery. The modern rule permits recovery without a strict and literal per-

formance if there has been a substantial performance and the contractor has attempted in good faith to perform the contract. If a contract has been performed substantially and deviations from the contract have been made, but not wilfully or in bad faith, the party so performing can recover the contract price, less the amount of damages caused by such deviation. The amount of such damages is usually the expense of completion according to the contract."

See, also, to the same effect: *Drew v. Goodhue*, 74 Vt. 436, 52 Atl. 971; *Morgan v. Gamble*, 230 Pa. 165, 79 Atl. 410. Under the rule of these authorities, the right of the appellants to maintain the action is manifest.

It is finally contended that the contract had been rescinded by notice to the appellants subsequent to January 1, 1912, and prior to the institution of the action. The evidence as to rescission was oral and was in conflict. It will be assumed that the notice of rescission was given as claimed by the respondents. It is claimed by the respondents, in support of the right to a rescission, that the contract was without mutuality. This contention cannot be sustained. The agreement was fairly entered into, and the appellants immediately entered upon its performance in good faith, and procured assignments from all the numerous creditors with the exception of the two named. In addition to this, as a part of the agreement, it was understood that the bankruptcy proceedings would be dismissed. The evidence offered to show that the dismissal of the bankruptcy proceedings was one of the inducing causes for the contract is not very complete; but there is sufficient in the record to show that it was understood that the dismissal of these proceedings was a part of the understanding, and that they were subsequently dismissed. This gives to the contract mutuality. The trial court, when the appellants were seeking to show the facts relative to the dismissal of the bankruptcy proceedings, sustained objections to such testimony. The evidence was obviously competent and should have been admitted. But as already said,

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the record, while meager, contains sufficient to show what was actually done.

The respondents in support of their contention that the contract lacked mutuality, cite the case of *Herrin v. Scandinavian-American Bank*, 65 Wash. 569, 118 Pac. 648. In that case there was a contract for the sale of corporate stock for future delivery. An order was drawn upon the bank directing payment when the stock should be deposited therein. Before the tender of the stock the contract was rescinded. That case is plainly distinguishable from the one here presented. Here, prior to the time that the attempted rescission took place, if it did take place, the bankruptcy proceedings had been dismissed; assignments of all claims of the creditors which the appellants were obliged to secure prior to the time they should have the note delivered to them, had been deposited in the bank, with the exception of the two above mentioned. The contract had, in fact, been substantially performed on the part of the appellants several months before the attempted rescission is claimed to have taken place. The right of the appellants to the possession of the note and for a judgment thereon is plain.

The judgment will be reversed, and the cause remanded with direction to the superior court to enter a judgment for the sum of \$4,500 on the note, and interest thereon at 8 per cent per annum from its date, and in addition thereto, for an attorney's fee in the sum of \$500.

ELLIS, MORRIS, and FULLERTON, JJ., concur.

[No. 10824. Department Two. July 1, 1913.]

JOHN TEYNOR *et al.*, *Respondents*, v. CHLOE HEIBLE *et al.*,
Appellants.¹

HUSBAND AND WIFE—COMMUNITY PROPERTY—PUBLIC LANDS—HOMESTEAD ENTRY—TITLE. Where a single man made homestead entry upon public lands, and subsequently married and thereafter patent issued to him, the land became his separate property.

EXECUTORS AND ADMINISTRATORS—FINAL DISTRIBUTION—NOTICE—SUFFICIENCY—JURISDICTION. Under Rem. & Bal. Code, §§ 1589, 1499, and 1500, requiring the time for final settlement of an estate to be fixed for not less than four or more than eight weeks from the time of making the order, and notice to be given by personal service or by publication for at least four successive weeks, a final distribution is without jurisdiction, and is subject to collateral attack, where only 21 days elapsed between the date of the order and the time of the hearing, and less than three weeks elapsed between the first publication of notice and the date of the hearing.

JUDGMENTS—CONCLUSIVENESS—COLLATERAL ATTACK—RECITALS. A recital in a judgment of final distribution that the court finds from "affidavits on file" that due service of notice was made, does not raise the presumption, on collateral attack, of a valid personal service, where the only affidavits on file show a defective publication; since the only affidavits on file negative personal service and affirmatively show want of jurisdiction.

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered March 15, 1912, upon findings in favor of the plaintiffs, in an action for partition. Affirmed.

Lovell & Davis, for appellants.

Adams & Naef, for respondents.

FULLERTON, J.—This action was brought by the respondents against the appellants for the partition of certain real property. The land in question was acquired from the United States under the homestead laws by one Peter Teynor, who died without lineal heirs. The respondents are his father and mother. The appellant, Chloe Heible, was his wife at

¹Reported in 133 Pac. 1.

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the time of his death. The other appellants claim an interest in the land through mortgages or contracts to convey executed by Chloe Heible. Peter Teynor entered the land in the year 1901. He was then a single man, never having theretofore been married. On January 1, 1903, he intermarried with the appellant Chloe Heible. He made final proof under the homestead laws on September 12, 1906, and thereafter a patent to the land from the United States was duly issued to him. He died intestate on October 30, 1906, without having parted with the title acquired by him under the homestead patent.

Letters of administration on Peter Teynor's estate were issued out of the superior court of the county in which the land is situated to John A. Willis, the father of the appellant Chloe Heible. The administrator performed the duties of his trust, and on October 26, 1908, filed his final account with the estate, together with a petition asking for the distribution of the property thereof, praying that his account be settled and allowed, and that the estate be distributed to those lawfully entitled thereto. The court, sitting in probate, entertained the petition, and made an order, dated as of the date on which the petition was filed, appointing November 16, 1908, as the time for hearing the petition; further ordering that the clerk of the court give notice thereof by causing notices to be posted in three of the most public places in the county in which the land is situated, "at least two weeks before said day of settlement and hearing of petition, and publish notice thereof, according to law, for two weeks before said day of settlement and hearing upon the petition," in a certain designated newspaper. Proof by affidavit was made of the posting and publishing by the clerk, and on the day fixed for the hearing the court entered a decree in which it approved the final account and distributed the estate. That part of the decree relating to the proof of service of notice of the time of the hearing recited that it appeared "to the court by affidavits on file herein that due

and regular notice as required by law, and the order of this court, was given of the hearing hereof." The order distributed the whole of the estate to the appellant Chloe Heible as the sole heir at law of Peter Teynor, deceased. In making the order of distribution, the probate court proceeded on the theory that the real property was, when acquired from the United States, the community property of Peter Teynor and Chloe Teynor, his wife, and that it descended on the death of Peter Teynor, under the statutes of the state governing the descent and distribution of community real property, to the wife, since the entryman died without issue.

The court in the case now before us, on the same state of facts, held the property to be the separate property of Peter Teynor, and to have descended on his death, under the statutes governing the distribution and descent of separate property, one-half to the father and mother of the deceased, and one-half to his wife, Chloe Teynor; holding further that the decree of distribution entered in the administration proceedings was void because entered without sufficient notice. The first question suggested by the record relates, therefore, to the nature of the title acquired by Peter Teynor in virtue of his homestead entry. Did the land become, on his acquisition of the title thereto, his separate property, or did it become the community property of himself and his then wife, the appellant in this proceeding?

On the question, our own cases are out of harmony. Indeed, they seem incapable of being reconciled, whether considered with relation to the facts upon which they are founded or with relation to the reasons by which they are thought to be sustained. The cases in which the question of the nature of the title acquired by a homestead entry from the United States is considered are the following: *Philbrick v. Andrews*, 8 Wash. 7, 35 Pac. 358; *Bolton v. La Camas Water Power Co.*, 10 Wash. 246, 38 Pac. 1043; *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 33 L. R. A. 671; *Forker v. Henry*, 21 Wash. 235, 57 Pac. 811; *In re Feas' Estate*, 30 Wash.

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51, 70 Pac. 270; *Ahern v. Ahern*, 31 Wash. 384, 71 Pac. 1023, 96 Am. St. 912; *Towner v. Rodegeb*, 33 Wash. 153, 74 Pac. 50, 99 Am. St. 936; *James v. James*, 35 Wash. 655, 77 Pac. 1082; *Cox v. Tompkinson*, 39 Wash. 70, 80 Pac. 1005; *Hall v. Hall*, 41 Wash. 186, 83 Pac. 108, 111 Am. St. 1016; *Cunningham v. Krutz*, 41 Wash. 190, 83 Pac. 109, 7 L. R. A. (N. S.) 967; *Curry v. Wilson*, 45 Wash. 19, 87 Pac. 1065; *Rogers v. Minneapolis Threshing Machine Co.*, 48 Wash. 19, 92 Pac. 774, 95 Pac. 1014; *Delacey v. Commercial Trust Co.*, 51 Wash. 542, 99 Pac. 574, 130 Am. St. 1112; *Krieg v. Lewis*, 56 Wash. 196, 105 Pac. 483, 26 L. R. A. (N. S.) 1117; *Curry v. Wilson*, 57 Wash. 509, 107 Pac. 367; *Eckert v. Schmitt*, 60 Wash. 23, 110 Pac. 635.

Grouping the cases according to their facts, and the decision of the court upon the facts, in the first group can be placed the cases of *Philbrick v. Andrews* and *In re Feas' Estate*. In these cases all that appeared in the record was that the land was occupied by the entryman and his wife at the time final proof was made and patent issued, and it was assumed, as if not subject to controversy, that the property was the community property of the husband and wife.

In the second group can be placed *Forker v. Henry*, and *Rogers v. Minneapolis Threshing Machine Co.* In the first case, the land was settled upon and entered as a homestead by a single woman, who lived thereon for some four years and then married. Thereafter, while the marriage relation continued, she made final proof and was granted a patent. In *Rogers v. Minneapolis Threshing Machine Co.*, the land was settled upon and entered by a married man living with his wife. Some two years later, while living on the land, the wife died leaving issue. A year and a half thereafter, the entryman married a second time, and two years after the second marriage, made final proofs and received a patent. In each of the cases the land was held to be the separate property of the entryman.

In the third group can be placed *Kromer v. Friday*, *Ahern v. Ahern*, *James v. James*, and *Cox v. Tompkinson*. In these cases, the wife resided upon the land with her husband at the time of its entry, and continued to reside thereon until her death, which occurred in each instance prior to making final proof and the receipt of patent, although occurring after the full period of residence required by the Federal statute as preliminary to making final proof had expired. The property acquired was held to be community property.

In the fourth group can be placed *Bolton v. La Camas Water Power Co.*, and *Cunningham v. Krutz*. In the first of these cases, the wife resided on the land from the time of its entry by the husband until the residence period expired, but died before the making of final proof and the issuance of patent. In the second case the entry was made by a married man living with his wife. The wife died some three years later, after a continuous residence on the land subsequent to the entry. A few months later, the husband commuted the entry and received a patent for the land. The property was held in each case to be the separate property of the husband.

In the fifth group can be placed *Curry v. Wilson*, 45 Wash. 19, 87 Pac. 1065; *Curry v. Wilson*, 57 Wash. 509, 107 Pac. 367; *Krieg v. Lewis*, and *Eckert v. Schmitt*. In these cases, the wife resided with the husband on the homestead from the time of the original entry until after the making of final proof, and in two of them until after patent was issued. The land acquired was held to be the community property of the spouses.

In a sixth group can be placed the cases of *Towner v. Rodegeb*, *Hall v. Hall*, and *Delacey v. Commercial Trust Co.* In the first case, the land was settled upon prior to the extension of the public surveys thereover, and prior to the time the land was subject to entry under the public land laws. The settler died before the land became so subject to entry, and it was held that he had no estate of inheritance therein, or estate of any kind that was cognizable in proceedings in-

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stituted on his estate in the probate court. In *Hall v. Hall*, the parties thereto, while husband and wife, settled upon unsurveyed lands of the United States and lived thereon together as husband and wife for a period of more than five years. Prior to the time the lands were open to entry, they were divorced, and subsequent to the divorce, the lands became subject to entry, and the husband entered the same as a homestead, and subsequent thereto made final proofs and received a patent. It was held that his divorced wife had no interest in the property. In *Delacey v. Commercial Trust Co.*, it was held that a mere settlement on government land by a husband and wife conferred no community interest in the land.

The arguments thought to sustain these several conclusions we shall not set forth. It is manifest, however, that no reasoning based upon principle can reconcile the first with the second group, or the third with the fourth. It is the opinion of the court now that the property in each of these groups, if nothing more appeared in the record than is shown in the opinion, should have been held to be the separate property of the entryman. In other words, the rule should be that in all cases where the marital relation does not exist at the time of the original settlement and entry, and continue until final proof is made, the property should be held to be the separate property of the spouse who finally acquires the patent to the land. The folly of any other rule is illustrated by the case of *Rogers v. Minneapolis Threshing Machine Co.*, 48 Wash. 19, 92 Pac. 774, 95 Pac. 1014. This case we have placed in the second group, but it belongs under its facts in the fourth group also. In that case, it will be remembered that the entryman was married at the time he made entry on the land; that his then wife died leaving issue some two years later, after a continuous residence thereon; that, about a year later, the entryman married a second time, resided with his second wife on the property for some two years more, and made final proof and received a patent. If a community in-

terest is impressed on the land by the fact of marriage at the time of its entry, as is held in the fourth group of cases, and if a community interest is also impressed by the fact of marriage at the time of the making of final proof, and the issuance of the patent, as is held in the first group, then this land was impressed with the interests of two distinct communities, the one in favor of the issue of the first wife, and the other in favor of the second wife. A rule that leads to such incongruous results is certainly not to be commended.

The facts of the case at bar bring it within the cases found in both the first and second group of cases as we have listed them, and since we conclude that the decisions in respect to the first group rather than in the second were wrong in principle, we hold the property in question here to have been the separate property of the husband on its acquisition from the government.

The second question suggested by the record is the validity of the decree of distribution entered in the probate proceedings. This present action is a collateral attack upon the decree, and it is conceded that, unless the record shows affirmatively a want of jurisdiction, it is conclusive upon all the world. We think the record does show affirmatively a want of jurisdiction. The statute relating to decrees of distribution in probate proceedings provides that such decrees may be made on the application of the executor or administrator, or any one interested in the estate, but only after "notice has been given in the manner required in regard to an application for the sale of land by an executor or administrator." Rem. & Bal. Code, § 1589 (P. C. 409 § 595). The statute relating to the sale of real estate by an executor or administrator provides that the court, after the petition for the sale is filed, shall "make an order directing all persons interested to appear at a time and place specified, not less than four or more than eight weeks from the time of making such order," and that a "copy of such order to show cause shall be personally served on all persons interested in the estate at least

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ten days before the time appointed for the hearing of the petition, or shall be published at least four successive weeks in such newspaper as the court shall order." Id. §§ 1499, 1500 (P. C. 409 §§ 395, 397). From an examination of the dates before set out, it will be observed that, in this instance, the time elapsing between the date of the order to show cause and the time fixed for the hearing was only twenty-one days, and that less than three weeks elapsed between the first publication of the order and the time fixed for the hearing. The notice actually shown in the record, therefore, was clearly insufficient to give the court jurisdiction to make the order.

But the appellant says that, since this action is a collateral attack on the decree, all intendments are in favor of its validity, and since personal service on the persons interested ten days prior to the time fixed for the hearing is made equivalent to published notice, the court will presume, in the absence of a showing to the contrary, that such a service was made. But, as we say, we think the record does show on its face to the contrary. The recital in the judgment is that the court finds from the "affidavits on file" that due service was made. As the only affidavits on file, or that were put on file, show service by publication only, the idea of any other service is clearly negatived. "If a want of jurisdiction affirmatively appears on the face of the record, the judgment will be held to be void upon collateral attack as well as direct attack." *Wick v. Rea*, 54 Wash. 424, 103 Pac. 462.

The judgment appealed from will stand affirmed.

ELLIS, MORRIS, and MAIN, JJ., concur.

[No. 11111. Department Two. July 8, 1913.]

WRIGHT RESTAURANT COMPANY *et al.*, *Appellants*, v.
CHAUNCY WRIGHT *et al.*, *Respondents*.¹

APPEAL—DECISION—LAW OF CASE. Where, in a former appeal of an action to restrain the use of "Chauncy Wright's Cafe" as a trade-name, the supreme court held sufficient on demurrer a complaint alleging an agreement that such trade-name should be used by a partnership, and later by a corporation organized by the partners, but that Mr. Wright might reenter business using his own name with such precautions as to prevent unnecessary confusion, and on a subsequent trial on the merits, the evidence was to the effect that no such agreement was made but that the partnership and corporation were to be run under the name of "Wright Restaurant Company," the facts do not support the allegations of the complaint, and the case is not within the rule announced in the prior decision.

TRADE-MARKS AND TRADE-NAMES — UNFAIR COMPETITION — AGREEMENTS. Where a restaurateur having a long established business under the name of "Chauncy Wright's Cafe," took in a partner and they formed a corporation and did business under the name "Wright Restaurant Company," it is not unfair competition that Mr. Wright, after sale of his interest in the corporation, should reenter business in the same locality using his full name on the window, to the injury of the business of the corporation, where there had been no agreement that he should not reenter business or that the partnership or corporation should do business under the name "Chauncy Wright's Cafe," but the corporation had agreed to do business under its corporate name of "Wright Restaurant Company."

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 2, 1912, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action for an injunction, and for damages. Affirmed.

James B. Murphy (*Lucas C. Kells*, of counsel), for appellants.

Leopold M. Stern and *Donworth & Todd*, for respondents.

¹Reported in 133 Pac. 464.

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MAIN, J.—The purpose of this action is to obtain a permanent injunction restraining the use of a trade-name and to recover damages.

This cause was heretofore before this court upon an appeal from a judgment dismissing the case after a general demurrer interposed to the complaint had been sustained and the plaintiffs had refused to plead further. The court there held that the complaint stated a cause of action, and the cause was reversed and remanded with directions to overrule the demurrer and determine the cause upon the merits. *Wright Restaurant Co. v. Seattle Restaurant Co.*, 67 Wash. 690, 122 Pac. 348.

For a period of approximately twenty-five years prior to September 19, 1912, the date of the trial in the superior court, the defendant Chauncy Wright had been a successful restaurateur in the city of Seattle, Washington. He and the places operated by him had become widely known among certain classes of patrons. About six or seven years prior to the above mentioned date, he opened a restaurant at No. 164 Washington Street, in Seattle. Thereafter, he became acquainted with the plaintiff Charles Gearhart, who, upon a number of occasions subsequent thereto and prior to October, 1909, offered to purchase a half interest in the business. Wright, however, refused to sell a half interest, but did, in October, 1909, agree with Gearhart to sell him the entire interest in the business at 164 Washington Street. Gearhart paid one-half of the purchase price, took possession, and the papers were prepared and ready to be signed on the following day. But when Wright took the lease for the building to his lessors to be transferred, they refused to accept an assignment from Wright to Gearhart. Wright not being able to assign the lease, and Gearhart being unwilling to give up the deal, they became equal partners in the business. If the sale had been completed as originally contemplated, it was arranged that the business should be conducted by Gearhart at this location under a name other than that of "Chauncy

Wright's Cafe." During the time the business was operated by Wright and Gearhart, it was understood and agreed that the signs bearing the name "Chauncy Wright's Cafe," which had been used by Wright when he was the sole proprietor, should be removed. For this purpose a painter was at one time employed. The work, however, was delayed, and the signs were not changed or removed, and at the time of the trial remained practically the same as when Wright conducted the business alone. The business was conducted as a partnership for about five months, when, by mutual agreement, a corporation was formed under the corporate name of "Wright Restaurant Company" (the plaintiff corporation), each of the partners taking one-half of the capital stock.

Thereafter, and in October, 1910, Wright sold and transferred all of his stock to Gearhart. At the time the proposal to sell his stock was made, Wright stated: "If you buy me out you cannot use my name on your restaurant." After Gearhart became the sole proprietor of the place, he had painted on the alley side of the building the words "Wright Restaurant Company." Gearhart also advertised his place under the name of "Wright Restaurant Company," and not as "Chauncy Wright's Cafe." It was clearly understood by Gearhart when he purchased the stock that Wright intended soon to again engage in the restaurant business. A short time after the sale of the stock to Gearhart, Wright did open two new restaurants, one of which was soon sold, and the other, located at 110 Occidental avenue, just around the corner from Gearhart's restaurant and not over 400 feet distant, continued to be conducted by Wright. This latter business was owned by the Seattle Restaurant Company, the defendant corporation, Wright being the president thereof. The name on the window was "Chauncy Wright," in large letters, and in smaller letters underneath, "President of Seattle Restaurant Co." Wright advertised

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this business extensively under practically the same name as appeared on the window.

The plaintiffs assert that, by reason of the use of this name in the manner indicated, their business at 164 Washington Street, which prior to the opening of this restaurant was a prosperous and paying one, has been injuriously affected, and that their business has dwindled until at the time this action was brought they were operating at a loss; that this loss of business is solely due to the use, in the manner indicated, of the trade-name "Chauncy Wright." The facts above stated are substantially as found by the trial court, and an examination of the record demonstrates that they are sustained by the evidence. The plaintiffs in their complaint pray for a permanent injunction prohibiting and restraining the defendants from the use of the name "Chauncy Wright," and for damages. The cause was tried to the court without a jury, and resulted in a judgment in favor of the defendants. The plaintiffs appeal.

When the cause was here on the former appeal (67 Wash. 690, 122 Pac. 348), the law of the case was settled. It was there held, based upon the allegations of the complaint, that Wright had the privilege of entering the restaurant business when and where he would and to use his name in connection therewith, but that it was his duty to adopt such affirmative precautions in the use of his name as to prevent unnecessary confusion of his with Gearhart's business. According to the allegations of the complaint as stated in the former opinion, when Gearhart entered into partnership with Wright, it was mutually agreed that the trade-name, "Chauncy Wright's Cafe," should be used by the partnership; and on the formation of the corporation, it was also agreed that the name "Chauncy Wright's Cafe" should remain upon the window and that the business of the corporation should be conducted under that name. But upon the trial of the cause upon the merits, on which the present appeal is predicated, the trial court found that, when the partnership was formed, there was

no agreement as to the use of the name "Chauncy Wright" by them while they were associated in business together; and it was further found that, at the time of the incorporation of the Wright Restaurant Company, it was not agreed between the parties that the name "Chauncy Wright's Cafe" should remain upon the window, but that it was agreed that the restaurant should be run under the name of the Wright Restaurant Company, and not under the name of "Chauncy Wright's Cafe." These findings are amply supported by the evidence. It will be seen, therefore, that the facts as developed upon the trial do not support the allegations of the complaint, and, consequently, the case is not within the rule announced in the prior decision.

The judgment will be affirmed.

ELLIS, MORRIS, and FULLERTON, JJ., concur.

[No. 11058. Department Two. July 8, 1913.]

CHARLES R. POWERS *et al.*, Respondents, v. MARY A. MUNSON,
Appellant.¹

DEEDS—CONSIDERATION. A deed otherwise regular is valid whether founded on a valuable or a good consideration.

HUSBAND AND WIFE—CONVEYANCES BETWEEN—SEPARATE PROPERTY. Where a wife conveyed to her husband a half interest in certain lots, theretofore her separate property, either as a gift or upon consideration of certain payments to be made from the husband's separate estate, the interest conveyed becomes the separate property of the husband, regardless of the form of the deed, and they thereafter hold the property as tenants in common and not as community property.

SAME—CONVEYANCES BETWEEN—FORM OF DEED—COMMUNITY PROPERTY. Rem. & Bal. Code, § 8766 with reference to the form of a conveyance between husband and wife of community property has no application to conveyances of an interest in separate property.

¹Reported in 133 Pac. 453.

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Opinion Per FULLERTON, J.

SAME—HUSBAND'S SEPARATE PROPERTY—CONVEYANCE. Under Rem. & Bal. Code, § 5915, the husband may convey his separate property without his wife's joining in the deed.

APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW. The supreme court will not discuss a question not submitted to the trial court and as to which there was no suggestion either in the pleadings or the evidence.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered October 7, 1912, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

C. B. Reynolds and *B. H. Rhodes*, for appellant.

Dysart & Ellsbury and *C. D. Cunningham*, for respondents.

FULLERTON, J.—The respondents brought this action against the appellant to quiet their title to an undivided one-half interest in certain real property. They had judgment in the court below, and this appeal was taken therefrom.

The property in question consisted of two lots, situated in the city of Centralia, on which there was a building used as a rooming and boarding house. The property was acquired by the appellant while she was a single woman. Subsequent to its acquisition, she intermarried with one George N. Munson, and after the marriage, deeded to Munson, by a quitclaim deed, an undivided one-half interest in the property subject to two certain mortgages, the one for \$400, and the other for \$100. The deed was executed on October 23, 1909, and recited that it was made for a "valuable consideration and one dollar." Subsequent to the execution of the deed, Munson resided on the premises with the appellant for some one and one-half years. The court found that the deed was a gift from the appellant to her husband. The evidence, however, we think would have justified a different finding. The appellant testified that Munson agreed to pay, as a consideration for the deed, the mortgages on the premises and certain

other obligations then due the nature of which was not made clear, possibly certain back taxes, and overdue insurance premiums. A portion of these obligations he did pay, but whether all that was due or not, the evidence does not show. But whether the deed is founded on a good or a valuable consideration is not very material. A good consideration is sufficient to its validity, it being otherwise regular.

On July 8, 1911, George N. Munson, for a consideration of \$800, conveyed by warranty deed, to the respondent Charles R. Powers, his undivided one-half interest in the property. In this deed the appellant did not join, and when the respondent sought to exercise ownership in the property, she forbade him access thereto, and refused to account to him for the rents, issues, and profits thereof.

The appellant defended the action on the ground that the deed of conveyance from her husband to the respondent passed no interest in the property sought to be conveyed. She contends that the property, on the execution of the deed from herself to her husband, became the community property of herself and her husband, and she invokes the rule, heretofore announced by this court, to the effect that a deed of conveyance of community real property executed by only one of the spouses passes no interest in the property to the grantee named in the deed. But we think the appellant mistakes the effect of the deed from herself to her husband. The title to property acquired by deed, whether separate or community, is determined, not from the form of the deed by which it is conveyed, but from the manner of its acquisition. Property acquired by gift, or purchased with the separate funds of the spouse to whom it is conveyed, is the separate property of that spouse. So this property, whether it was a gift from the wife to the husband as the court found, or whether it was purchased by the husband's individual funds as the court might have found, became the separate property of the husband, and the husband and wife held it thereafter, not as property belonging to them as a community, but as tenants

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in common; that is to say, each of them held a separate estate in an undivided half thereof.

There is no objection under the statutes, as the appellant seems to contend, to the form of the conveyance. The statute relating to conveyances between husband and wife of community real property, Rem. & Bal. Code, § 8766 (P. C. 95 § 47), has no application to conveyances of this character. The wife may convey to her husband the whole or any part of her separate property, by any of the recognized forms of conveyances, as fully and freely as she may convey the same to any other person. *Id.*, §§ 5916, 5925, 5926, 5927 (P. C. 95 §§ 9, 1, 5, 21). Since, therefore, the deed from the appellant to her husband vested in him as his separate property an undivided half interest in the land conveyed, it follows that the husband could, without his wife joining him, make a valid conveyance of the same to the respondent. *Id.*, § 5915 (P. C. 95 § 25).

It is contended in the brief of counsel that the property was the homestead of the appellant and her husband, and hence no part of it could be conveyed without both of them joining in the conveyance. But there is no suggestion, either in the pleadings or the evidence, of this nature, and were it possible that a homestead could be claimed in property situated as this property is situated, we must decline to enter upon a discussion of the question, since it was not among the issues submitted to the trial court.

The judgment will stand affirmed.

MAIN, MORRIS, and ELLIS, JJ., concur.

[No. 10976. Department One. July 8, 1913.]

STEVE YENCO, *Respondent*, v. JULIA BALLOG *et al.*,
Appellants.¹

APPEAL—REVIEW—FINDINGS. Findings upon directly conflicting evidence of witnesses heard and seen by the trial court will not be disturbed on appeal when warranted by the evidence.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered July 1, 1912, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Davis & Neal, for appellants.

Louis I. Lefebvre, for respondent.

PARKER, J.—The plaintiff seeks to have his title to a lot in Tacoma quieted as against the claim of the defendants thereto, which claim is rested upon a sheriff's sale of all of the right, title and interest of Mary Dzurik therein under a judgment rendered against her in the superior court of Pierce county. A judgment was rendered in favor of the plaintiff, quieting his title as against the claim of the defendants, upon the ground that, neither at the time of the rendering of the judgment under which the sheriff's sale was made, nor at any time thereafter, did Mary Dzurik have any right, title or interest in the lot, either in law or equity; but that at such times the plaintiff was the lawful owner thereof, free from any claims of Mary Dzurik. From this disposition of the cause, the defendants have appealed.

In April, 1909, while Mary Dzurik was the owner of the lot in question, she made an assault upon Julia Ballog, resulting in personal injuries to the latter. Thereafter, on May 3, 1909, Mary Dzurik conveyed the lot to her brother, Steve Yenco, this respondent. Thereafter, on July 8, 1909,

¹Reported in 133 Pac. 1198.

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Opinion Per PARKER, J.

Julia Ballog and her husband commenced an action in the superior court of Pierce county, seeking recovery of damages from Mary Dzurik on account of the personal injuries resulting from the assault made by her upon Julia Ballog. That action resulted in judgment against Mary Dzurik in favor of Julia Ballog and her husband for the sum of \$150 and costs. Thereafter, on July 8, 1911, execution was duly issued upon that judgment, resulting in the sale by the sheriff of Pierce county of all the right, title and interest of Mary Dzurik in and to the lot. It is upon this judgment and sheriff's sale that appellants' rest their claim of title to the lot. The main question presented by the issues raised in the pleadings is whether the deed executed by Mary Dzurik to respondent, after her assault upon Julia Ballog and before the commencement of the action for damages claimed on account of the injuries resulting from that assault, was fraudulently made for the purpose of defrauding the creditors of Mary Dzurik, and particularly Julia Ballog and her husband.

The argument of learned counsel for appellants is addressed almost wholly to questions of fact. The controlling evidence, other than the deed from Mary Dzurik to respondent and the record of the action for damages, consists of testimony of witnesses given in open court. This testimony is in hopeless conflict, is very much involved, was given largely through an interpreter, and shows the parties to the action to be of foreign birth and of but little experience touching the nature of the ownership of real property under our laws. We will not undertake the seemingly hopeless task of analyzing this testimony in detail with a view of demonstrating the truth or falsity of the various conflicting statements therein; we deem it sufficient to say that we have read the entire testimony and are convinced therefrom that the learned trial court, seeing and hearing the witnesses, was warranted in believing that the deed was given for a valuable, adequate money consideration passing from respondent to Mary

Dzurik, and that, at the time of its execution, neither Mary Dzurik nor respondent knew that Julia Ballog and her husband were contemplating an action against Mary Dzurik for damages on account of the assault made by her upon Julia Ballog, and that the deed was not given with a view of defrauding Julia Ballog and her husband by seeking to prevent the collection of any judgment they might recover in such an action.

While the evidence is not free from suspicious circumstances pointing to an intent on the part of Mary Dzurik and respondent to defraud Julia Ballog and her husband by the conveyance of the lot to prevent collection of any judgment which might be recovered on account of the assault, in view of the whole record, we cannot say that the learned trial court was in error in declining to take the view that the deed was given with such fraudulent intent. We think no useful purpose would be served by a further detailed discussion of the facts involved. Other errors are suggested relating to the admission and rejection of evidence; we think, however, that whatever our view might be relative thereto, they are of such minor importance that our conclusion upon the correctness of the learned trial court's decision upon the merits would not be different, in view of the fact that this is an equity case tried before the court without a jury. We are constrained to hold that the court did not err in its decision in favor of respondent.

The judgment is therefore affirmed.

CHADWICK, GOSE, and MAIN, JJ., concur.

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Opinion Per MORRIS, J.

[No. 11075. Department Two. July 8, 1918.]

GEORGE A. WILKIE, *Appellant*, v. CLARISSA A. BAILEY *et al.*,
Respondents.¹

EXECUTORS AND ADMINISTRATORS — APPOINTMENT — APPLICATION — JURISDICTION. An application for the appointment of an administrator need not be made by the person for whom letters are asked; and where it states all jurisdictional facts, the court acquires jurisdiction to make the appointment, and if the appointee fails to qualify, to appoint any other suitable person without any formal renunciation or any further application.

Appeal from a judgment of the superior court for King county, Frater, J., entered December 14, 1912, denying an application for appointment as administrator of an estate, after a hearing before the court. Affirmed.

E. T. Trimble, for appellant.

Buck, Benson & Knutson, for respondents.

MORRIS, J.—Clarissa A. Hamblet, a resident of King county, died intestate December 4, 1911, leaving an estate consisting of both real and personal property. On December 15, Clarissa A. Bailey, a niece of the deceased, filed a petition asking for the appointment of Alonzo Hamblet, a nephew of deceased, as administrator, the petition touching the fact of heirship reciting that the deceased left her surviving certain nephews and nieces. Citation was issued, and on January 4, 1912, the petition came on for hearing, when the court appointed Alonzo Hamblet as such administrator and fixed the amount of his bond. Alonzo Hamblet failed to qualify as such administrator, and on January 26, 1912, this fact being brought to the attention of the lower court, Clarence L. Gere was appointed administrator of this estate, and he thereupon qualified and proceeded to administer upon the estate. On October 25, 1912, George A. Wilkie filed his

¹Reported in 133 Pac. 388.

petition requesting his appointment as administrator of the estate. Citations issued and were served upon the administrator and others, and upon the hearing the lower court denied the application of Wilkie, and he appeals.

The claim of error is that the lower court, in all proceedings prior to the filing of the petition by appellant, was acting without jurisdiction. The application of Clarissa A. Bailey was sufficient. It contains all the jurisdictional facts referred to in *McLean v. Roller*, 33 Wash. 166, 73 Pac. 1123, as necessary to be set forth under our statute. Appellant seems to interpret the statute as requiring the person to whom letters of administration were issued to make the application. We find no such requirement. When Alonzo Hamblet failed to qualify, the jurisdiction obtained by the court under the petition of Clarissa A. Bailey was sufficient to authorize the appointment of any person whom the court deemed competent and suitable, without any formal application by the person so appointed or formal renunciation by the person failing to qualify, as contended by appellant. This being the only question in the case submitted by the appeal, nothing more need be said.

The judgment is affirmed.

ELLIS, FULLERTON, and MAIN, JJ., concur.

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Opinion Per MORRIS, J.

[No. 11134. Department Two. July 8, 1913.]

J. M. JORGUSON, *Appellant*, v. APEX GOLD MINES COMPANY,
Respondent.¹

CORPORATIONS—DIVIDENDS—PAYMENT FROM CAPITAL. An agreement by a corporation, in consideration of the sale of stock, to guarantee the payment of \$1,000 in dividends within eighteen months, is void, where there were no net profits, since to enforce it would contravene public policy and violate Rem. & Bal. Code, § 3697, making it unlawful to declare dividends except out of net profits or to reduce its capital stock by paying any portion of it to its stockholders.

SAME—GUARANTEEING DIVIDENDS. A bond by a corporation guaranteeing dividends in a sum equal to the amount paid for the stock, makes the stock subscription a fictitious one and violates Const., art. 12, § 6, prohibiting the issue of stock except to *bona fide* holders for full value.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered March 22, 1913, upon findings in favor of the defendant, dismissing an action on contract, after a hearing before the court. Affirmed.

Milo A. Root, for appellant.

Frank A. Steele and *Harrison Bostwick*, for respondent.

MORRIS, J.—On March 22, 1909, appellant purchased from the respondent two thousand shares of its capital stock for the sum of \$1,000. As a part of said transaction, it was agreed that the corporation should guarantee that the dividends upon such stock would amount to \$1,000 within the next eighteen months, and that the corporation would pay to the plaintiff the sum of \$1,000 as dividends within that time. Pursuant to this agreement, the respondent, acting under a resolution unanimously adopted by its stockholders, executed and delivered to appellant a bond, the condition of which was that if, within the period of eighteen months, the corporation should pay to appellant, his heirs, personal rep-

¹Reported in 133 Pac. 465.

representatives, or assigns, the sum of \$1,000 in cash as dividends on the stock so purchased, then the obligation should be void; otherwise it should remain in full force and effect and the appellant should, in addition to holding his shares of stock as fully paid up, be entitled to receive from the corporation the sum of \$1,000 less any amount which he should have received in dividends on the stock during the time. The eighteen months having expired, and the corporation having failed to pay to the appellant any sum in dividends upon his stock, and having otherwise failed to comply with the obligations of its bond, appellant brought this action upon the bond in which he sought to recover from the corporation the sum of \$1,000. Upon a hearing it was found by the court that, since the execution of the bond, the net earnings of the corporation had not been sufficient to declare any dividends upon its capital stock, and that no dividend had been so declared. The court thereupon dismissed the action, and the case is brought here on appeal.

Upon these facts we think the judgment must be sustained. The bond sued upon obligated the company to pay \$1,000 in dividends within eighteen months, or if such sum be not paid as dividends, the same should be paid in any event. The courts have uniformly held that dividends can be declared and paid only out of the profits or surplus earnings of the corporation.

“The rule of law that requires corporations to preserve their capital intact is alone sufficient to prevent the corporation from paying dividends except out of profits.” 5 Thompson, Corporations (2d ed.), § 5305.

It being established in this case that there were no profits out of which this dividend could be declared, it follows that, if the bond be enforced against the corporation, payment must be made out of its capital, which the law will not permit, upon the ground that any contract whereby a corporation seeks to diminish its capital stock, except in some way permissible by statute, contravenes public policy and is un-

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enforceable. Rem. & Bal. Code, § 3697 (P. C. 405 § 41),⁴ contains provisions that it shall not be lawful to declare dividends except from the net profits arising from the business of the corporation; nor in any way pay to stockholders any part of the capital stock or reduce the same, except in the manner thereafter provided. Under this section it has been held that a corporation could not reduce its capital stock by paying any portion of it to the stockholders. *Tait v. Pigott*, 32 Wash. 344, 73 Pac. 364; *Tait v. Pigott*, 38 Wash. 59, 80 Pac. 172; *Tacoma Ledger Co. v. Western Home Bldg. Ass'n*, 37 Wash. 467, 79 Pac. 992.

Counsel for appellant contends this section has no application, and that the only question to be determined is whether or not the contract is *ultra vires*. We think, however, it is clear that, since there are no profits nor surplus out of which this dividend can be paid, payment must be made, if at all, from the capital of the corporation, which is a direct violation of the statute. In *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156, a corporation guaranteed a semi-annual dividend of five per cent upon its preferred stock, and it was held that, when it appeared there were no profits from which the dividends could be made, the guarantee became wholly inoperative for want of something to which it was applicable, and was void as opposed to public policy, and that the extent to which the law would permit a corporation to go in guaranteeing dividends would be to guarantee the payment when there were profits to pay them, or if profits were not realized to the necessary amount in any one year, the stockholder would be entitled when they were realized to have all arrears paid up. In *Pittsburg & C. R. Co. v. County of Allegheny*, 63 Pa. St. 126, the railroad company guaranteed the payment of interest on county bonds given to it as a subsidy, and it was held that the payment of such interest out of the capital before earnings were made was within the prohibition of the charter against paying dividends out of the capital. Similar rulings have been made in *Bingham v.*

Marion Trust Co., 27 Ind. App. 247, 61 N. E. 29; *Painesville & H. R. Co. v. King*, 17 Ohio St. 534; *Ohio College of Dental Surgery v. Rosenthal*, 45 Ohio St. 183, 12 N. E. 665; *Troy & Boston R. Co. v. Tibbits*, 18 Barb. 297; *Memphis Grain and Elevator Co. v. Memphis & C. R. Co.* (Tenn), 5 S. W. 52.

We have found one case where the facts are so similar that it would be useless to attempt to distinguish them: *Smith v. Alabama Fruit Growing & Winery Ass'n*, 123 Ala. 538, 26 South. 232. The corporation there sold to the plaintiff \$1,500 worth of its capital stock, and executed its bond with sureties that it would return the \$1,500 in four semi-annual dividends. These dividends were not paid, and action was brought upon the bond. A demurrer was interposed to the complaint upon the grounds, (1) that the contract was illegal and void in that it undertook to indemnify plaintiffs against loss for a purchase of stock, making issue thereof fictitious and without consideration; (2) that the contract was in violation of the constitution prohibiting corporations to issue stock or any bond for the payment of money except for money, labor done, or property actually received, and declaring void all fictitious increase of stock; (3) that it appeared from the complaint that the contract sued upon was illegal, without consideration, and void. This demurrer was sustained, and on appeal the court, in affirming the judgment, said:

"It requires little, if indeed anything, beyond this statement of the case to demonstrate the correctness of the city court's ruling. The contract sued on is, of course, executory, and its enforcement is sought in this action in furtherance and completion and consummation of a fictitious subscription to the capital stock of a corporation, a transaction prohibited by the organic law of the land and frequently denounced as vicious and incapable of conferring or passing any rights. The jurisdiction of our courts cannot be invoked to enforcement and execution of such undertakings. In substance the contract is for the payment back by the

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corporation to the subscriber for its stock of the money he subscribed, thus leaving the issuance of the shares to him wholly unsupported by any consideration, fictitious and void; and the action upon the contract is an invocation of the powers of the courts to the accomplishment of this end expressly forbidden by the constitution of the state. If this could be done an easy road would be opened to the utter emasculation of this most just and necessary provision of the constitution by evasions so palpable as to be little, if at all, short of avowed and direct attempts to defy and override it."

We have a like provision in our constitution, found in art. 12, § 6:

"Corporations shall not issue stock, except to *bona fide* subscribers therefor, or their assignees; nor shall any corporation issue any bond or other obligation for the payment of money, except for money or property received or labor done. The stock of corporations shall not be increased, except in pursuance of a general law, nor shall any law authorize the increase of stock, without the consent of the person or persons holding the larger amount in value of the stock, nor without due notice of the proposed increase having been previously given in such a manner as may be prescribed by law. All fictitious increase of stock or indebtedness shall be void."

The bond in suit provides that, in case the full sum of \$1,000 be not paid as dividends within eighteen months, the purchaser of the stock shall, in addition to holding his stock as fully paid, be entitled to receive from the corporation \$1,000 in cash less any amount received in dividends. This would mean, as said in the Alabama case, the payment back to the stockholder of the money he paid for his stock, while permitting him to retain his stock as fully paid, thus leaving the issuance of the stock wholly unsupported by any consideration, a direct conflict with the constitutional provision. See, also, 5 Thompson, Corporations (2d ed.), § 5354; 2 Cook, Corporations (6th ed.), § 544.

The judgment is affirmed.

ELLIS, FULLERTON, and MAIN, JJ., concur.

[No. 10138. Department One. July 8, 1913.]

THE STATE OF WASHINGTON, *Appellant*, v. W. R. CRAWFORD
*et al., Respondents.*¹

CARRIERS—RATE REGULATIONS—CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS—CRIMINAL PROSECUTIONS—EXCESSIVE PENALTIES. Laws 1911, p. 558, § 25, providing that no street railroad company shall charge or collect more than five cents for one continuous ride within the city limits, and *Id.*, p. 606, § 95, making it a gross misdemeanor for any officer or agent to violate the law or fail to comply with any order of the railway commission, punishable under Rem. & Bal. Code, § 2267, by imprisonment for not more than one year, or by a fine of not more than \$1,000, or by both, is unconstitutional as being a denial of the equal protection of the laws in that the company may only have a hearing upon a claim of the unconstitutionality of the statute at the risk of such heavy and successive penalties as to amount to intimidation and foreclose its right to litigate the question.

Appeal from a judgment of the superior court for King county, Ronald, J., entered December 13, 1911, in favor of the defendants, upon sustaining a demurrer to the complaint, dismissing a prosecution for a violation of the public service commission law. Affirmed.

The Attorney General and *Stephen V. Carey, Assistant, John F. Murphy* and *S. H. Steele*, for appellant.

Scott Calhoun, for respondents.

GOSE, J.—Section 25 of the public service commission law (Laws 1911, p. 558), provides:

“No street railroad company shall charge, demand, or collect more than five cents for one continuous ride within the corporate limits of any city or town. . . .”

Section 95 of the act is as follows:

“Every officer, agent or employee of any public service company, who shall violate or fail to comply with, or who procures, aids or abets any violation by any public service

¹Reported in 133 Pac. 590.

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company of any provision of this act, or who shall fail to obey, observe or comply with any order of the commission, or any provision of any order of the commission, or who procures, aids or abets any such public service company in its failure to obey, observe and comply with any such order or provision, shall be guilty of a gross misdemeanor." Laws 1911, p. 606.

The code, Rem. & Bal., § 2267 (P. C. 135 § 29), provides:

"Every person convicted of a gross misdemeanor for which no punishment is prescribed in any statute in force at the time of conviction and sentence, shall be punished by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both."

The defendants were prosecuted, convicted and sentenced in the justice court of Seattle precinct, King county, for an alleged violation of the provisions of § 25 of the public service commission law. The charge is that the defendants, being the officers, employees, agents and servants of the Seattle, Renton & Southern Railway Company, a railway corporation operating a street railway within the corporate limits of the city of Seattle, unlawfully charged and collected from the complaining witness a ten-cent fare for one continuous ride within the corporate limits of the city. Upon appeal to the superior court, a demurrer to the complaint was sustained. The state prosecutes an appeal.

The point urged by the respondents in support of the judgment is that the railway company is, by the terms of the statute, denied the equal protection of the law, and that its property is liable to be taken without due process of law, because it may only have a hearing upon a claim of the unconstitutionality of the statute, at the risk, if mistaken, of being subjected to such heavy and successive penalties as to practically foreclose it of the right to litigate that question. This view has received the sanction of the supreme court of the United States. *Ex parte Young*, 209 U. S. 123. A like principle was announced in *Ex parte Wood*, 155 Fed. 190.

In the *Young* case, certain stockholders of the Northern

Pacific Railway Company brought suit in the Federal court against the company, the members of the state railroad and warehouse commission, and the attorney general of the state of Minnesota. The object of the suit was to prevent compliance with the provisions of certain acts of the legislature of the state of Minnesota and certain orders of the state railroad and warehouse commission, prescribing the rates which should be charged for transportation of passengers and commodities upon railroads within the state. The bill, among other things, prayed that the attorney general and the members of the commission be enjoined from enforcing the provisions of the several acts. The court gave a temporary restraining order as prayed for. On the next day the state, on the relation of its attorney general, commenced an action in the state court against the railway company, the object of which was to compel the company to put into effect the rates and charges fixed by the laws of the state. Thereupon, and in response to a rule to show cause why he should not be punished as for contempt, the attorney general, after a hearing, was held to be in contempt of the Federal court out of which the temporary restraining order had issued. He thereupon sued out a writ of habeas corpus in the Federal supreme court. In discussing the effect of extreme and cumulative penalties in the several legislative acts, the court, at page 147, said:

“It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights. It is urged that there is no principle upon which to base the claim that a person is entitled to disobey a statute at least once, for the purpose of testing its validity without subjecting himself to the penalties for disobedience provided by the statute in case it is valid. This is not an accurate statement of the case. Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to

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a subject over which the jurisdiction of the legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation and over which the jurisdiction of the legislature is complete in any event. We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates."

The fine to be imposed under the Minnesota statute was heavier than that provided by our statute, but the principle is the same. Here the penalty is "punishment by imprisonment in the county jail for not more than one year or by a fine of not more than \$1,000, or by both." It is apparent that in the operation of a street railway in the city of Seattle, the officers and agents of the operating company might violate the statute one thousand times, or perhaps many thousand times, each day, and in each instance would subject themselves to the penalty of the law.

The attorney general argues that the statute gives the courts a wide discretion in the matter of punishment, and that

they are permitted to impose a fine as low as one cent and to impose a jail sentence as short as one hour. This is true, but it is also true that their discretion would permit the maximum sentence. As an illustration of the practical working of the act, it seems proper to observe that the justice court imposed a sentence of thirty days' imprisonment in the King county jail.

The attorney general cites *State ex rel. Railroad Commission v. Oregon R. & Nav. Co.*, 68 Wash. 160, 123 Pac. 3, and insists that it announces a view that sustains the constitutionality of the law. In that case, after a full hearing upon the merits, the railway company appearing by counsel, the commission entered an order requiring the railway company to erect a suitable station at Hay, in Whitman county, for the accommodation of passengers and freight, the same to be completed within forty-five days after the service of the order. The time for complying with the order expired on September 24, 1909, but the station was not completed until the 11th day of January following. The railroad company did not seek a review of the order within the time prescribed by law or at all; hence, under the statute, Rem. & Bal. Code, § 8629, the order became "final and conclusive." The suit was for a recovery of a penalty for noncompliance with the order, and a judgment was entered for \$1,000. In the discussion of the case the court said that the railroad company appeared at the hearing, submitted its testimony, and raised no question as to the sufficiency of the complaint, or the jurisdiction of the commission under the complaint to make an investigation of its station facilities at Hay. It was held, that the proceeding was regular; that the commission had jurisdiction; and that the railroad company having failed to review the order as it was permitted to do under the statute, the order became, in the language of the statute, final and conclusive. The distinction is obvious. The necessity for the station had been legally adjudged, and the penalty was imposed under the statute because of the failure of the railroad company to

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obey the order. This distinction was recognized by Mr. Justice Brewer in *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 102, where he said:

"It is doubtless true that the state may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented."

The view we have taken of the case makes it unnecessary to consider the other questions discussed by counsel. The judgment is affirmed.

PARKER, MOUNT, and CHADWICK, JJ., concur.

[No. 11002. Department Two. July 8, 1913.]

WILLIAM WALKER, *Respondent*, v. W. L. LANNING *et al.*,
Respondents, BRATNOBER LUMBER COMPANY,
Appellant.¹

MECHANICS' LIENS—NOTICE—DUPLICATE STATEMENTS—SUFFICIENCY—PREMATURE NOTICE—STATUTES—TIME OF TAKING EFFECT. A duplicate statement of materials furnished for the construction of a building, mailed June 6, 1911, in compliance with, and one day prior to the taking effect of, Laws 1911, p. 376, § 1, amending the law relating to duplicate statements, was premature and ineffective for any purpose; since the amendatory act of 1911 was not retroactive, and the notice was not sufficient under the old law which required duplicate statements to be furnished with, and at the time of, each delivery.

Appeal by intervener from a judgment of the superior court for King county, Ronald, J., entered May 10, 1912, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to foreclose a mechanics' lien. Affirmed.

¹Reported in 133 Pac. 462.

Edwin H. Flick (C. E. Hughes, of counsel), for appellant.
Moncrieffe Cameron, for respondent.

ELLIS, J.—This is an appeal by the intervener, Bratnober Lumber Company, from a judgment denying a lien upon certain property belonging to the defendants Pierano, for the value of materials delivered at the request of the defendant Lanning, their contractor. Materials for the construction of the building on the property were delivered by the lumber company between May 6, 1911, and September 30, 1911. For the materials delivered between May 6th to and including June 6th, the lien was allowed. But for the material delivered between June 7th and September 30th, the lien was refused, on the ground that the new law as to notice, which went into effect on June 7, 1911, was not complied with, in that the notice of the contemplated furnishing of the subsequently delivered materials was given on June 6, 1911, before the new law went into effect, and was hence premature. Whether this notice, confessedly prematurely mailed, was sufficient basis for a lien is the sole question presented for our consideration.

The lien law of 1909, Rem. & Bal. Code, § 1133 (P. C. 309 § 55), required successive notices to be sent to the owner at the time of each delivery of materials. The act of 1911, Laws 1911, page 376, which went into effect on June 7, 1911, amended the law of 1909, by requiring a single notice to be delivered or mailed "not later than five days after the first delivery of such material." It is admitted that the owner received the written notice in due course of the mail and retained it. On that circumstance the appellant bases its contention that, the spirit of the statute having been met, the lien should be sustained. It seems plain, however, that unless the notice was given while the law under which it purports to have been given was in force, there was no compliance with that law either in letter or in spirit. There can be no compliance with a nonexistent law. The real inquiry is, when

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was the notice given? The duty of giving notice is imposed by the statute upon the materialman. It is his act which constitutes the notice. Neither the notice itself nor its efficacy is by the statute made to depend upon any disposition which may be made of the notice after he complies with the statute by a performance of the duty of delivering or mailing the notice which it imposes upon him. Whether the owner of the property sought to be charged reads the notice, loses it, destroys it, or keeps it, in no manner affects the fact of notice or its efficacy. Manifestly the notice was given, if at all, and the statute was complied with, if ever, at the time when the claimant mailed the notice. If he did not give the statutory notice then and by that act, he never did. The character or quality of that act cannot be changed by the subsequent retention and reading of the notice by the owner. There being no statute in force at the time the claimant did the only act which could constitute compliance with the statute, the act was no more a compliance than if the law had never been passed. If he could effectually comply by the advance performance of the duty imposed by the subsequently existing law by one day, then he could so comply by an advance performance of a week or a month. If he could comply by anticipating the future law, then, for the same reason and with equal logic, he could comply by anticipating the terms of that future law. He could comply by anticipating the first delivery of materials by a day, or any other period, provided only that the owner keep the notice until after the first delivery of materials. This may not be done, as is clearly shown by our decision in *Finlay v. Tagholm*, 60 Wash. 539, 111 Pac. 782.

In that case we held under the prior statute, Rem. & Bal. Code, § 1133 (P. C. 309 § 55), requiring a duplicate statement of all materials to be delivered or mailed to the owner "at the time" when such material is delivered, that a notice mailed at a subsequent time a few days, a week or a month after the delivery of the materials, furnished no basis for a lien. The

facts here are inverted but the reasons are the same. The lien is statutory; the notice is its statutory basis. Phillips, Mechanics' Liens (3d ed.), § 63. It must be given under and comply with the statute in force when it is given. When this notice was given, the old law was in force. It did not comply with that law. Conceding that it was in such form as prescribed by the law of the next day, still it was not given under that law. In either view, therefore, it must fail to furnish a basis for the statutory lien depending upon it. A law speaks for the first time when it goes into effect. Whether it has a retroactive effect depends not upon when it speaks, but how it speaks. This act of 1911 does not speak retroactively; it is not a curative act. It is plainly prospective in its operation.

"Until the time arrives when it is to take effect and be in force, a statute which has been passed by both houses of the legislature and approved by the executive has no force whatever for any purpose, and all acts purporting to have been done under it prior to that time are void." 36 Cyc. 1192.

See, also, *State ex rel. Atkinson v. Northern Pac. R. Co.*, 53 Wash. 673, 102 Pac. 876; *Harrison v. Colgan*, 148 Cal. 69, 82 Pac. 674; *Santa Cruz Water Co. v. Kron*, 74 Cal. 222, 15 Pac. 772; *Miller v. Kister*, 68 Cal. 142, 8 Pac. 813.

The notice in this instance, giving it its utmost effect by reason of its retention by the owner of the property, was no more than actual notice. It will not do to say that the object of the notice is merely to give notice and that any notice which serves that purpose is a substantial compliance with the law. This would nullify the statute. It would make actual notice, however acquired or given, take the place of statutory notice. We have held to the contrary. *Robinson Mfg. Co. v. Bradley*, 71 Wash. 611, 129 Pac. 382.

We have been cited to no authority, and have found none, sustaining the appellant's contention.

The judgment is affirmed.

MAIN, MORRIS, and FULLERTON, JJ., concur.

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[No. 11278. Department Two. July 8, 1913.]

J. D. GRANT, *Appellant*, v. ERNST HUSCHKE, *Respondent*.¹

APPEAL—REVIEW—FINDINGS. A verdict for damages on a counterclaim for fraud, in an action for the price of land, is conclusive on appeal when supported by the evidence, although conflicting.

FRAUD—DAMAGES—MISREPRESENTATIONS—KNOWLEDGE OF FALSITY—MATTERS OF FACT. False representations that land at a distance was level and capable of irrigation and good fruit land, inducing a sale, are actionable although made without knowledge of their falsity or intent to deceive, where the vendor knew that the vendee was in ignorance of the facts and relied upon the representations; since they were matters of fact and not of opinion, susceptible of his own knowledge.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered November 26, 1912, upon the verdict of a jury rendered in favor of the defendant, in an action on a promissory note. Affirmed.

Gates & Emery and Mark F. Mendenhall, for appellant.
Merritt, Oswald & Merritt, for respondent.

ELLIS, J.—This action is here for the second time on appeal. The complaint states two causes of action; the first declares upon a promissory note; the second upon taxes paid by the plaintiff upon certain real estate situated in Seattle which he had received from the defendant in exchange for twenty acres of land in Spokane county, which taxes, it is claimed, the defendant had agreed to pay. To the second cause of action, the defendant counterclaimed damages because of alleged false and fraudulent representations made by the plaintiff concerning the Spokane land, as an inducement to the exchange. Upon the trial, the defendant had a verdict for \$618.15 upon his counterclaim. The trial court granted a new trial upon a single ground mentioned in the

¹Reported in 133 Pac. 447.

order, but denied it on all other grounds. The defendant appealed, and this court, refusing to consider any other ground than that upon which the order was based, reversed the order and remanded the cause with direction to enter judgment upon the verdict. *Grant v. Huschke*, 70 Wash. 174, 126 Pac. 416. Upon receipt of the remittitur, judgment was entered accordingly. The plaintiff now appeals.

The trade was made in Seattle. The respondent had never seen the land which he received in exchange and knew nothing of the character of the country around it. The appellant knew this. The appellant admitted that the respondent told him that he, the respondent, could not go to see the land. It was several hundred miles from the place of negotiation. The respondent testified that the appellant represented that the land was level as a floor, was first class fruit land and was ready for irrigation, and that he relied upon these representations in making the exchange. The appellant testified that he represented that the land was practically level and could all be placed under irrigation and that it was good fruit land. As to the actual character and value of the land, there was a sharp conflict in the evidence. While several witnesses for the appellant testified that other lands in that vicinity were good fruit lands, no one who had any actual knowledge of this particular tract testified that it was as good as the average fruit lands in that vicinity. There was much evidence to the effect that it was not; that the top soil was very thin and underlaid with pure sand or gravel; that it was not level, but was covered with depressions from one-half foot to two feet deep, and could not be irrigated by the ordinary means of furrows without leveling. There was also some evidence that the top soil was so thin that the process of leveling would remove all of the soil from the higher places and deposit it in the lower, thus leaving much of the land unproductive sand. There was evidence tending to show that the land as it actually was, was worth \$25 to \$35 an acre, and that, if it had been as represented, it would have been worth from \$75 to

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\$100 an acre. Much of this evidence was controverted, but the respondent's evidence in support of his counterclaim tended to establish that the representations as claimed by him were made, that they were false, and that he relied upon them to his damage in a sum equal to the verdict. The counterclaim was for damages. The questions of fact were for the jury under proper instructions. Whatever our personal views as to the weight of the evidence, we are bound by the verdict. We cannot try the case *de novo*, as we would an equitable action for rescission. We must confine our review to a consideration of the admissibility of the evidence and the correctness of the instructions.

The appellant contends that there was no evidence that he knew that his representations were false, that such knowledge is an essential element in the establishment of actionable fraud, and that, in the absence of proof of such knowledge, the admission of evidence as to his representations was error. It is usually held that representations to be actionable must be made *scienter*, but it does not follow that actual knowledge of the true facts or of the falsity of the representations must be shown. Representations, as of his own knowledge, of material and inducing facts susceptible of knowledge, made by a vendor in ignorance of the facts, but with the knowledge that the vendee is relying upon the representations as true and under circumstances reasonably excusing the vendee from investigating for himself, are actionable on the part of a vendee so relying to his injury. In such a case, the fraud of the vendor consists in representing as true, with knowledge that it is being relied upon as true, that which he did not know to be true. This rule is supported by the trend of modern authority and has been consistently adhered to by this court. *Hanson v. Thompkins*, 2 Wash. 508, 27 Pac. 73; *Sears v. Stinson*, 3 Wash. 615, 29 Pac. 205; *O'Connor v. Lighthizer*, 34 Wash. 152, 75 Pac. 643; *Lawson v. Vernon*, 38 Wash. 422, 80 Pac. 559, 107 Am. St. 880; *West v. Carter*, 54 Wash. 236, 103 Pac. 21; *Best v. Offield*, 59 Wash. 466,

110 Pac. 17, 30 L. R. A. (N. S.) 55; *Godfrey v. Olson*, 68 Wash. 59, 122 Pac. 1014; *Arrowsmith v. Nelson*, 73 Wash. 658, 132 Pac. 743; Sutherland, *Damages* (3d ed.), § 1169. The evidence was competent and sufficient to take the case to the jury under this rule. Obviously, the rule is the same whether the action be in equity for a rescission or at law for damages.

As covering the question of fraudulent representations, the court gave the following instructions:

“(7) With respect to the alleged representation that said land was as level as a floor, I instruct you that by that expression is meant that said land was reasonably and practically level; and with respect to the alleged representation that said land was first-class fruit land, I instruct you that that representation refers to first-class fruit land in the locality in question. The burden of proof with respect to this cause of action is upon the defendant Huschke, and I instruct you that it is incumbent upon him, in order to recover, to establish said cause of action, not merely by a preponderance of the evidence, but by evidence that is clear, satisfactory and convincing.

“(8) If, therefore, you find from the evidence in this case that is clear, satisfactory and convincing, and in view of the conditions and surroundings of the parties, that the plaintiff Grant, at the time and place in question, did represent that the said land in Spokane county was as level as a floor, taking said representations as heretofore explained to you as meaning a representation that it was reasonably and practically level, and that said land would not have to be leveled for the purpose of irrigating, and that it was all first-class fruit land, and that all of it was capable of being cultivated and irrigated, and if in truth and in fact said land was not reasonably and practically level but would have to be leveled for the purpose of irrigating, or was not first-class fruit land in that locality, or that all of it was not capable of being cultivated and irrigated, and you further find that the defendant Huschke in good faith believed and relied on said representations and pretenses and by means thereof was induced to enter in the exchange of lands in question, and would not have done so but for said representations and pre-

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tenses, then you should find for the defendant Huschke. If, upon the other hand, you do not believe by testimony that is clear, satisfactory and convincing either that said representations were made or that same if made were untrue, then you should find for the plaintiff Grant."

The appellant contends that these instructions did not correctly state the law, in that they did not submit to the jury the question as to whether the appellant knew of the falsity of the representations and made them with fraudulent intent. Under the foregoing decisions it is plain that an instruction that the jury must find from the evidence an actual knowledge on the appellant's part of the falsity of his representations before it could find for the defendant would have been positive error. In *Lawson v. Vernon, supra*, the same contention was made, and objection taken to an instruction reading as follows:

"If you find from the evidence, as a matter of fact, that prior to the date of sale the defendant Vernon pointed out certain lands to one of the plaintiffs which were not as a matter of fact the lots conveyed, and that plaintiffs believed they were the same lands, and were told by the said Vernon that they were the same lands, that plaintiffs are entitled to recover any damages which they sustained by reason of such misinformation, even if the said Vernon did not purposely mislead them; in other words, if the defendant Vernon made a mistake and pointed out the wrong property, even if his mistake were unintentional, yet he and his partner must be held for any pecuniary damages said mistake may have caused the plaintiff."

It is obvious that this instruction is less favorable to the vendor than that here complained of. In the *Lawson* case, in approving the above quoted instruction, this court said:

"The prevailing doctrine is that, if a person states as true, as of his own knowledge, material facts susceptible of knowledge, to one who relies and acts thereon to his injury, he cannot defeat recovery by showing that he did not know that his representations were false, or that he believed them to be

true. The falsity and fraud consists in representing that to be true which he did not know to be true."

In *West v. Carter, supra*, the instruction sustained in the *Lawson* case was quoted and approved as a correct statement of the law. It is there said:

"And this is the just theory, for the result to the party who is deceived is exactly the same whether the intention of the party upon whose representations he relied was fraudulent or not. If one by misrepresentation, even though innocent, is the cause of damage and injury, it would certainly be inequitable to visit that damage and injury upon the head of one who was in no way to blame, rather than upon the one who was the cause of such damage or injury."

And again we said in *Best v. Offield, supra*:

"It makes no difference whether the representations made were known by the vendor, as found by the court in this instance, to be false, or not. The effect on the purchaser would be the same, and if he had a right, under all the circumstances, to rely upon them, and did rely and act upon them, he can recover."

The rule as supported by a preponderance of authority is stated in 4 Sutherland, Damages (3d ed.), § 1169:

"But the doctrine which seems supported by the preponderance of authority is that if a person states as of his own knowledge material facts which are susceptible thereof to one who relies and acts upon them as true it is no defense to an action for deceit, if the representations are false, that the person making them believed them to be true. The falsity and fraud consist in representing that he knows the facts to be true of his own knowledge when he has not such knowledge."

The case of *Curtley v. Security Sav. Society*, 46 Wash. 50, 89 Pac. 180, when its facts are analyzed, does not militate against the view expressed in the several authorities above cited. In that case it was sought, by parol testimony of representations as to title, to import into a quitclaim deed a warranty of title. The court there, holding that in such a case the deceit must be intentional, said:

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“Were this not so, there could be no virtue in a warranty clause in a deed, as it would always be possible to show a warranty, even though the grantor may have expressly refused to warrant his title.”

The seeming conflict between that decision and the long line of decisions which we have cited is found in the inadvertent intimation in the *Curtley* case, appearing near the bottom of page 53, that a representation as to title is a representation of fact. Representations as to title are usually, if not always, mere statements of opinion, not of fact. Herein lies the real distinction between the case in hand and the *Curtley* case. Representations as to mere matters of opinion are usually not actionable at all. In order to be actionable they must be made, not only under circumstances clearly entitling the adverse party to rely upon them as true and with the actual intent that he shall so rely, but with conscious knowledge on the part of the person making them that they are false. The fraud consists in representing as his opinion that which is not his opinion. In such a case there must be an actual intent to defraud, and this must be proved by positive evidence. On the other hand, where the representations are as to pure matters of fact and made under circumstances entitling the adverse party to rely upon them as true, then the fact that they are false raises a legal presumption of fraudulent intent. The question of fraud thus becomes in such cases a question of law for the court, not a question of fact for the jury. In *Northwestern Steamship Co. v. Dexter Horton & Co.*, 29 Wash. 565, 70 Pac. 59, we find the same situation presented. As pointed out in *West v. Carter, supra*, the representation complained of in the *Dexter Horton* case was as to the solvency of a person and necessarily involved a mere expression of opinion. In view of the foregoing, we are constrained to hold that the instruction complained of was a correct statement of the law as applied to the facts presented.

The appellant bases several assignments of error upon the

admission of evidence and the qualification of certain of the witnesses to testify as to value. We have examined all of these assignments and we are satisfied that none of them presents sufficient ground for a reversal. We cannot discuss them in detail without extending this opinion to an unreasonable length.

The judgment is affirmed.

MAIN, MORRIS, and FULLETON, JJ., concur

[No. 11003. Department Two. July 8, 1913.]

ANGIE B. COLLINS *et al.*, Respondents, v. A. N. HOFFMAN
et al., Appellants.¹

TAXATION—SALES—FRAUD—SETTING ASIDE DEED—DEFENSES. The statutory regularity of tax foreclosure proceedings is no defense to an action to set aside a tax judgment and deed fraudulently obtained by one whose duty it was to pay the tax.

APPEAL—DECISION—REMAND. The reversal of a case and remand for a new trial on account of error in excluding documentary evidence, which was in the record, is in effect a decision that the evidence was sufficient to support a finding for appellant.

TAXATION—FORECLOSURE SALE—FRAUD—SETTING ASIDE TAX TITLE. A tax foreclosure and sale is void where the certificate of delinquency was purchased by the secretary of a corporation while it was owner of the land, and transferred to a figurehead and foreclosed for his benefit in an action naming the corporation as owner, the secretary accepting service, without notice to or making a subsequent purchaser from the corporation a party or publishing the summons; since the purchase of the certificate by one in his position of trust was a violation of his duty and amounted to a payment of the tax.

COVENANTS—SPECIAL WARRANTY—EFFECT—TAX TITLE. A conveyance by special warranty deed warranting the title against acts done by the grantor, imposes the duty of paying the delinquent taxes accruing while the owner of the land, or at least of notifying the grantee of an outstanding certificate when served with summons in an action to foreclose the tax.

¹Reported in 133 Pac. 450.

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TAXATION—TAX TITLE—SETTING ASIDE—ACTIONS—EVIDENCE. Proof that an owner, since deceased, was not made a party to tax foreclosure proceedings and that no summons was published or any service made establishes *prima facie* that he had no actual notice of the suit.

SAME—FRAUD—DEFENSES—NEGLIGENCE OF OWNER. One charged with deliberate fraud in obtaining a tax title cannot defend on the ground of the owner's negligence in failing to defend the tax foreclosure.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered May 24, 1912, in favor of the plaintiffs, after a trial on the merits before the court, in an action to cancel a tax foreclosure deed and to quiet title. Affirmed.

Kerr & McCord, for appellants.

Hughes, McMicken, Dovell & Ramsey, Otto B. Rupp, and J. B. Joujon-Roche, for respondents.

ELLIS, J.—This is an action to vacate and set aside, upon the ground of fraud, the proceedings in foreclosure of a certificate of delinquency for unpaid taxes upon certain land in Chehalis county. It is here for the second time on appeal. The undisputed facts are as follows: On February 13, 1900, the certificate of delinquency was issued to one Robert Lytle. At and for long prior to that time and until May 3, 1901, the land covered by the certificate was owned by the Fidelity Trust Company, a corporation, of which the defendant Gleason was secretary and manager. On June 18, 1900, the certificate was assigned by Lytle to the defendant Hoffman, who was cashier of the American Savings Bank and Trust Company, of which the defendant Gleason was also manager. On May 3, 1901, the Fidelity Trust Company conveyed the property covered by the certificate to John Collins. On August 6, 1902, the defendant Hoffman instituted foreclosure proceedings upon the certificate of delinquency. The Fidelity Trust Company and all persons unknown, if any, having or claiming an interest in the land, were made defend-

ants. No summons was ever published. On August 7, 1902, the defendant Gleason accepted service of summons in that action on behalf of Fidelity Trust Company as its secretary. The Fidelity Trust Company made default, and on October 17, 1902, a judgment foreclosing the tax certificate was entered. At a public sale pursuant to that judgment, the property was bid in by the defendant Hoffman, to whom the treasurer of Chehalis county executed a tax deed on November 13, 1902. John Collins died testate in April, 1903. On September 29, 1903, the plaintiffs Angie B. Collins, John Francis Collins and R. L. Hodgdon, as executors and trustees under the will of John Collins, deceased, and Angie B. Collins in her own right as widow of John Collins, deceased, commenced this action.

The allegations of the complaint are sufficiently set forth in our opinion on the former appeal, to which reference is made. *Collins v. Hoffman*, 62 Wash. 278, 113 Pac. 625, Ann. Cas. 1913 A. 1. The relief sought was a vacation of the foreclosure proceedings, the cancellation of the tax deed, and the entry of a decree removing the cloud created by those proceedings and quieting the plaintiffs' title to the premises against the defendants and each of them. The claim of right to this relief was based upon the theory that the defendant Gleason was the real party in interest in the tax foreclosure proceeding; that he thereby sought to secure title to the property in violation of his duty as secretary and manager of the Fidelity Trust Company; that he acquired the delinquency certificate while that company was the owner of the land; and that the proceedings and the tax deed founded thereon were void as to the Fidelity Trust Company and its successors in title. At the first trial, the foregoing facts were established. The plaintiff offered certain letters tending to prove that the defendant Gleason was the real party in interest; that he personally directed the foreclosure proceedings, paid all the expenses thereof and directed that the tax deed when issued to Hoffman be delivered to himself, and that

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the defendant Hoffman was a mere figurehead representing the defendant Gleason in the entire transaction. This evidence was excluded and the action was dismissed. Upon appeal the exclusion of this evidence was held error, and the cause was reversed and remanded for a new trial. The second trial resulted in a judgment for the plaintiffs. The defendants now appeal.

The appellants devote much of their brief to an argument based upon the regularity of the tax foreclosure proceedings, and to the establishment of the claim that, as a matter of law, John Collins was not a necessary party to those proceedings for the reason that, as a matter of fact, the land was assessed in the name of the Fidelity Trust Company. Neither the fact nor the law is disputed. The respondents contend, and we think soundly, that they are both immaterial to the issue here presented. The respondents do not seek to set aside the foreclosure proceedings because of any irregularity therein, or because of any failure to comply with the law regulating such proceedings. This action is grounded in fraud, and it is manifest that if the fraud is established, the statutory regularity of the proceedings would constitute no defense.

The law of the case was clearly settled by our former decision. We there said:

“The law would hardly permit Gleason, representing the Fidelity Trust Company in so close and confidential a relation, whose duty it was to pay the taxes, to become a purchaser at a sale made because of a failure to pay the taxes, and obtain a title without color of fraud as against either the trust company or its grantee.” *Collins v. Hoffman, supra*.

The clear effect of our former decision was that the evidence offered to show fraud on the part of the appellant Gleason was sufficient, *prima facie*, to establish that fraud, unless overcome by other evidence. The evidence offered and refused was documentary and was then in the record as identifications. If such was not the meaning of our former decision, it was an idle thing to remand the cause for a new trial

because of the exclusion of that evidence. These letters are now in evidence. We shall not set them out in full nor analyze them in detail. Space will not permit it. It is enough to say that they are largely set out in the briefs and have been carefully examined by every member of this department of the court, and we are at one in the opinion that, without other explanation of his connection with the transaction, they are sufficient to establish that the appellant Gleason was the real party in interest, that he owned the certificate, directed its foreclosure, paid all the expenses of the proceeding, and that the appellant Hoffman acted as a mere figurehead and received the tax deed for Gleason's benefit. The only explanation of this correspondence and of the relations of the appellant Gleason to the transaction is found in his own testimony. He testified that the certificate of delinquency was assigned to the appellant Hoffman "for convenience," admitted that Hoffman represented the Paxton Land Company; that the Paxton Land Company furnished the money to acquire the assignment; that he, Gleason, was president of the Paxton Land Company; that he was the largest stockholder in the Paxton Land Company; that in 1901, and ever since then, he owned something like 13,000 out of 16,000 shares of the capital stock of that company; that the company was practically "owned" by him; that after the deed was issued, Hoffman conveyed the property to the Paxton Land Company; that the Paxton Land Company later deeded the property to one Hogan, or to a corporation in which Hogan was interested; that he, Gleason, gave Hogan a written guaranty that if the title failed, Gleason would personally repay to Hogan the money invested; that when he wrote letters on behalf of the Paxton Land Company he used the word "I" instead of the Paxton Land Company, and used his own personal stationery. We thus have the appellant Gleason attempting to occupy and take advantage of a triplicate capacity in his relation to the transaction: Gleason, the man, Gleason, the stockholder, secretary and manager of the Fi-

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delity Trust Company, and Gleason, the president and chief owner of the Paxton Land Company, which is, in effect, Gleason incorporated.

It is manifest that neither Gleason, the man, nor the Paxton Land Company can claim immunity from the infection of fraud imported into the transaction by the connection therewith of Gleason, the stockholder, secretary and manager of the Fidelity Trust Company. He being the moving spirit in each of these three entities throughout the entire transaction, every sound consideration of equity affects the Paxton Land Company with notice of his relation and duty to the Fidelity Trust Company. The Paxton Land Company, whether regarded as Gleason incorporated or as a separate entity, cannot profit by the fraud of which, through its president and principal owner, it had notice. *Concordia Loan & Trust Co. v. Parrotte*, 62 Neb. 629, 87 N. W. 348. Every right which the Paxton Land Company can claim by reason of the tax deed relates to, and must find its validity in, the purchase of the delinquency certificate. This took place while the Fidelity Trust Company was the owner of the land and while the appellant Gleason was its secretary and manager, and was in violation of Gleason's duty to the latter company in that capacity. The purchase of the delinquency certificate was in law a payment of the taxes. As an officer and manager of the Fidelity Trust Company, it was Gleason's primary and elementary duty to see that its taxes were paid and its property protected from tax sale. He occupied to that company the closest relation of trust and confidence. He had charge of its records as its secretary, and conducted its business as its manager. It would be against the plainest principles of equity and public policy to permit him, or a corporation of which he was the chief owner, to profit by his dereliction of duty in this capacity.

"There is a general principle applicable to such cases which may be stated thus: That a purchase made by one whose duty it was to pay the taxes shall operate as payment only;

he shall acquire no rights as against a third party, by a neglect of the duty which he owed to such party. This principle is universal, and is so entirely reasonable and just as scarcely to need the support of authority. Show the existence of the duty, and the disqualification is made out in every instance." Cooley, Taxation (2d ed.), p. 501.

"It is well settled that one who is under a moral or legal obligation to pay the taxes is not in a position to become a purchaser at a sale made for such taxes. If such person permits the property to be sold for taxes, and buys it in, either in person or indirectly through the agency of another, he does not thereby acquire any right or title to the property, but his purchase is deemed one mode of paying the taxes." *Christy v. Fisher*, 58 Cal. 256.

See, also, *Maher v. Potter*, 60 Wash. 443, 111 Pac. 453; *Moss v. Shear*, 25 Cal. 38, 85 Am. Dec. 94; *Barlow v. Hitzler*, 40 Colo. 109, 90 Pac. 90; *Gibson v. Sexson*, 82 Neb. 475, 118 N. W. 77; *Concordia Land & Trust Co. v. Parrotte*, *supra*; *Brooks v. Garner*, 20 Okl. 236, 94 Pac. 694, 97 Pac. 995. Note to *Cone v. Wood*, 75 Am. St. 229.

If the Fidelity Trust Company had not subsequently conveyed this land to Collins, we apprehend that no one would have the hardihood to contend that its title would be divested by the tax sale, even as in favor of the Paxton Land Company, much less as in favor of appellant Gleason, under the facts disclosed by this record.

But it is argued that the deed of the land in question from the Fidelity Trust Company to John Collins was made in consideration of the settlement of litigation then pending between those parties, and that the land was conveyed by the Fidelity Trust Company by a special warranty deed, and therefore neither the Fidelity Trust Company nor the appellant Gleason, as its officer, owed any duty to Collins either to pay the taxes or to notify him of the tax foreclosure. Even if these facts might be held material, it is manifest that the Fidelity Trust Company, having warranted the title against acts done by it, was in duty bound to either pay the taxes accruing while it was owner of the land, or, at least,

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notify Collins that the certificate was outstanding. We think, however, that these matters are wholly immaterial. As we have seen, the tax sale must find its validity in the purchase of the delinquency certificate. That having taken place while the Fidelity Trust Company was the owner of the land, it amounted only to a payment of the taxes. The transfer of the certificate to an officer of the company cancelled it by force of law. The subsequent conveyance of the land to Collins did not infuse life into this dead certificate. The foreclosure proceedings could not revive it. The proceedings and the deed founded thereon are as void as to Collins as grantee of the Fidelity Trust Company as they would have been as to that company had it retained the land.

It is further argued that there was no evidence that John Collins did not have actual notice of the tax foreclosure proceedings. Obviously, he being now dead, absolute proof of such a negative is next to impossible. It was, however, proved that he was not a party to the proceedings, that no summons was ever published, and that no service of any kind was had, save the acceptance by Gleason for the Fidelity Trust Company. This raised a probable lack of actual notice sufficient to shift the burden of proof. If the appellant ever gave such notice, he is cognizant of that fact, and the duty was thus cast upon him to show it. The relation of the appellant Gleason to the entire transaction was such as to make this matter of notice a thing peculiarly within his knowledge. He attempted no such showing.

We are not impressed by the contention that, if Collins in his lifetime had used due diligence, he would have known of the foreclosure proceedings and protected his rights. Even had he known of the purchase of the tax certificate by the appellant Gleason and the Paxton Land Company and all of the attendant circumstances, he would have had the right to treat it as a payment of the taxes. His negligence, if he was negligent, in failing to defend in the tax foreclosure, to

which he was not a party, by setting up these facts, cannot purge the transaction of fraud as to him.

"The doctrine is well settled, that, as a rule, a party guilty of fraudulent conduct shall not be allowed to cry, 'negligence,' as against his own deliberate fraud." *Linington v. Strong*, 107 Ill. 295.

See, also, *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40.

Whether it was incumbent upon the respondents to tender these taxes in order to maintain this action, we find it unnecessary to decide. They have confessed that duty, made the tender, and kept it good by payment into court.

The judgment is affirmed.

MAIN, MORRIS, and FULLERTON, JJ., concur.

[No. 10936. Department One. July 10, 1913.]

I. S. TROVIK, *Appellant*, v. GRANT SMITH & COMPANY,
Respondent.¹

RELEASE—FRAUD—EVIDENCE—DEFENSE. An admitted written release, in consideration of \$150, is a complete defense to an action for damages where there was no proof of fraud, undue influence or want of understanding; and the court is warranted in directing a verdict for defendant.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered December 4, 1912, upon the verdict of a jury rendered in favor of the defendants by direction of the court, in an action for damages. Affirmed.

Carl J. Smith and John E. Humphries, for appellant.

Preston & Thorgrimson and Sanford C. Rose, for respondents.

PARKER, J.—The plaintiff seeks recovery of damages from the defendants, claimed to have resulted to him from their negligence. At the close of all of the evidence introduced

¹Reported in 133 Pac. 454.

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upon the trial in the superior court, counsel for the defendants moved the court for a directed verdict in their favor, which motion was granted, when a verdict was rendered by the jury accordingly. Thereupon judgment of dismissal upon the merits was entered. From this disposition of the cause, the plaintiff has appealed.

Among other defenses made by respondents, they alleged that, by way of compromise of appellant's claim for damages, but not admitting liability thereon, they paid to him the sum of \$150 in full satisfaction thereof, and that thereupon appellant executed and delivered to them a written release acknowledging the receipt of that sum in full satisfaction of his claim. The trial court evidently granted the motion for directed verdict upon the ground, among others, that the compromise and satisfaction was made and executed by appellant as alleged by respondents. That appellant accepted the \$150 and executed the written satisfaction of his claim is not only proven beyond controversy, but is admitted by appellant in his own testimony. Without noticing in detail the evidence touching the circumstances attending the receipt of this sum and the execution of the written satisfaction by appellant, we deem it sufficient to say that it wholly fails to show any undue influence or fraud on the part of respondents, or want of understanding on the part of appellant, attending the compromise and execution of the written satisfaction by appellant, as claimed by him. The learned trial court was clearly warranted in taking the case from the jury upon this ground. This renders it unnecessary to notice other contentions made by counsel.

The judgment is affirmed.

CHADWICK, GOSE, and MOUNT, JJ., concur.

[No. 11034. Department One. July 10, 1913.]

H. D. LARNED, *Respondent*, v. HOLT & JEFFERY,
INCORPORATED, *Appellant*.¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—DAMAGES TO ABUTTERS—CONTRACTORS—LIABILITY. A city contractor on a public improvement, using streets for a tramway by permission of the city, is not liable to abutting owners on account of temporary inconvenience or damage by reason of the prosecution of the work in a lawful manner, where the contractor was free from negligence.

Appeal from a judgment of the superior court for King county, Myers, J., entered June 11, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages to property by reason of obstructions in a street. Reversed.

Preston & Thorgrimson and *Sanford C. Rose*, for appellant.
Peterson & Macbride, for respondent.

PARKER, J.—The plaintiff sought to recover from the defendant damages in the sum of \$1,032 for injury to his hotel business by noise, smoke and vibration, which he claims resulted from the operation of the defendant's cars and engines upon a temporary trestle in the street in front of the hotel building occupied by him in Seattle. A trial before the court and a jury resulted in verdict and judgment against the defendant in the sum of \$250, from which it has appealed.

Respondent is the proprietor of a hotel business located in the building at the southwest corner of Lenora street and Westlake avenue, in the city of Seattle. Appellant is a contracting company, and from November 1, 1910, to June 1, 1911, was engaged in the execution of two large street improvement contracts for that city. One of these, referred to as the Denny Hill improvement, called for the excavation and removal of a very large quantity of earth; while the other, re-

¹Reported in 133 Pac. 460.

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ferred to as the Westlake avenue improvement, called for a very large quantity of earth filling. It was evidently desirable on the part of the city, as well as the appellant, that the earth taken from the Denny Hill improvement should be placed in the Westlake avenue improvement. To this end, the city granted to appellant the privilege of constructing, in certain streets leading from the Denny Hill improvement to the Westlake avenue improvement, a small railway upon which to run dump cars and a small locomotive engine for the purpose of transferring the earth from the Denny Hill improvement to the Westlake avenue improvement. The city not only granted this privilege, but directed what streets should be used, and also directed the manner of constructing the track. The route thus selected by the city passed along Lenora street in front of respondent's hotel. At this point it was necessary, and the city so directed, that the track be elevated so as to permit street cars and other traffic to proceed uninterrupted on that avenue. The track was so constructed, which brought it at no point nearer than thirty-eight feet to respondent's hotel building, and from ten to eighteen feet above the surface of the street along in front of the building. Upon the track thus constructed, appellant operated its cars and engines during the period mentioned, from November 1, 1910, to June 1, 1911, when the work was finished. There is no allegation or proof whatever of negligence on the part of the city or appellant in the prosecution of this work, nor as to unreasonableness of the time occupied in its prosecution. We assume, for argument's sake, that during this period respondent suffered some appreciable inconvenience and damage to his business by noise, smoke and vibration, occasioned by the operation of appellant's cars and engines, though, as we have noticed, it was undisputed that such annoyance and damages was not the result of negligent operation of the cars and engines.

It is contended by counsel for appellant that its challenge to the sufficiency of the evidence to sustain any judgment

against it, made by request for an instructed verdict in its favor and for motion for judgment notwithstanding the verdict, should have been sustained by the trial court, and that it is now entitled to a reversal of the judgment and a dismissal of the action upon that ground. We are constrained to agree with this contention. Upon the holding of this court in *Lund v. St. Paul, M. & M. R. Co.*, 31 Wash. 286, 71 Pac. 1032, 96 Am. St. 906, 61 L. R. A. 506, it seems plain the fact that appellant was doing public improvement work for the city, which, though appellant was an independent contractor, was under the direction and control of the city, places appellant in the same position that the city would be in had it been prosecuting the work itself, so far as liability for damages to respondent flowing therefrom is concerned: that is, if the city was not liable for consequential damages, upon the same principle appellant would not be. It seems to us that our recent decisions in *Stern v. Spokane*, 73 Wash. 118, 131 Pac. 476, and *Heiber v. Spokane*, 73 Wash. 122, 131 Pac. 478, are decisive of this case in appellant's favor upon the question of the damages claimed being consequential. This is the theory upon which counsel for appellant insists that it is not liable. We are constrained to so hold. It being plain that the city was engaged in a perfectly lawful undertaking, and to that end was temporarily causing its streets to be used by appellant, neither was liable to respondent for damages other than those which were the result of negligence.

It is apparent to the most casual observer that property and business locations in our centers of population are desirable and derive well known advantages from being so situated. The density of population which renders such locations valuable also renders the more necessary public improvements of the nature here involved, to the end that such advantages may be more fully enjoyed. The making of such public improvements necessarily results in more or less temporary inconvenience, and even damage to property and business in their neighborhood while being constructed. Aside from acts

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of negligence on the part of the public authorities in constructing such improvements, owners of property and business so temporarily inconvenienced or even damaged must bear such burdens as an incident to the enjoyment of the advantages which their locations give them.

The judgment is reversed, with directions to the superior court to dismiss the action.

CHADWICK, MOUNT, and GOSE, JJ., concur.

[No. 11197. Department One. July 10, 1913.]

THE CITY OF SEATTLE, *Respondent*, v. ARTHUR KING,
Appellant.¹

LICENSES—OCCUPATION—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 7507, providing that a city of the first class may grant licenses for any lawful purpose and fix the amount to be paid, authorizes the licensing of vehicles for hire.

SAME—LICENSE TAX—VALIDITY. Rem. & Bal. Code, § 7507, providing that a city of the first class may grant licenses for any lawful purpose and fix the amount to be paid therefor, authorizes licenses for revenue as well as for regulation; hence a license fee of \$4 for vehicles for hire is not invalid because in excess of the sum needed for regulation.

SAME—UNIFORMITY. Const., art. 7, requiring taxes to be uniform, has no application to a city license tax upon occupations.

Appeal from a judgment of the superior court for King county, Ronald, J., entered January 24, 1913, upon a trial and conviction of violating a city ordinance. Affirmed.

Scott Calhoun, for appellant.

James E. Bradford, *Ralph S. Pierce*, and *George A. Meagher*, for respondent.

PARKER, J.—The plaintiff was convicted in the police court of the city of Seattle of unlawfully using a vehicle for trans-

¹Reported in 133 Pac. 442.

portation of merchandise for hire, without having procured a license therefor, in violation of an ordinance of the city relating to the licensing of vehicles. He appealed to the superior court for King county, wherein he was again adjudged guilty, from which judgment he has appealed to this court.

The provisions of the ordinance involved, so far as we need notice them, are as follows:

"It shall be unlawful for any person, firm or corporation, to drive or operate within the city of Seattle, any automobile, taxicab, coach, carriage, omnibus, dray, truck, cart, wagon or vehicle of whatsoever kind or by whatsoever power propelled, used for the transportation of passengers, baggage, goods, merchandise or other article or thing, for hire, without first procuring a license so to do for each and every vehicle so used to be known as "Vehicle License." The fee for such vehicle license shall be the sum of four dollars (\$4) per annum, and every such vehicle license shall expire on the 31st day of December of the year for which such license is issued." Ordinance No. 28,570.

It is stipulated in an agreed statement of facts that the license fee is "more than sufficient to reimburse the city of Seattle for the expense of police supervision, issuance of license, and regulation necessary under said ordinance." No questions are here presented other than as to the power of the city to enact such an ordinance.

Counsel for appellant contends that the city possesses no statutory or charter authority for the passage of an ordinance licensing the use of such vehicle for hire. This contention, it seems to us, needs no answer other than a quotation from Rem. & Bal. Code, § 7507 (P. C. 77 § 83), relating to powers of cities of the first-class, as follows:

"Any such city shall have power— . . .

"33. To grant licenses for any lawful purpose, and to fix by ordinance the amount to be paid therefor."

It is further contended that the ordinance is void because the license fee exacted is more than sufficient to reimburse the city for issuing the license and for expenses incident to

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the regulation of the business. This contention apparently rests upon the theory that the ordinance amounts to the imposing of a tax under the guise of the power to license for regulation only. The decision of this court in *Fleetwood v. Read*, 21 Wash. 547, 58 Pac. 665, 47 L. R. A. 205, holds that the licensing power conferred by the language of the statute above quoted, upon cities of the first-class, gives to such cities power to license for revenue as well as regulation. So the fact that the amount of the license fee charged may be more in amount than the city could lawfully charge under the power to license for regulation only is of no avail to appellant. The court would be slow to hold a license fee of \$4 unwarranted in amount, even under the power to license for regulation only; but since the city has the additional power to license for revenue, it is plain that the ordinance is not void because of the amount of the license fee charged.

Some contention is made against the ordinance rested upon the provisions of article 7 of our state constitution relating to uniformity of taxation. This contention also finds its answer in the *Fleetwood* decision, as well as in our decisions in *Stull v. De Mattos*, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892, and in *In re Garfinkle*, 37 Wash. 650, 80 Pac. 188, holding that those provisions of our constitution have no application to license taxes upon occupations, but relate only to taxes levied upon property. *Sperry & Hutchinson Co. v. Tacoma*, 68 Wash. 254, 122 Pac. 1060, is in harmony with this view.

Counsel for appellant calls our attention to *State v. Bruce*, 23 Wash. 777, 63 Pac. 519, where the town of Hoquiam, a town of the fourth-class, was held not to possess the power to license bicycles to be ridden upon the public streets. A reading of that decision, however, will disclose the fact that there was no such charter power given the town of Hoquiam to license for both regulation and revenue as is found in the law relating to cities of the first-class.

Counsel for appellant also calls our attention to, and places

reliance upon, the cases of *In re Aubrey*, 36 Wash. 308, 78 Pac. 900, 104 Am. St. 952, and *State ex rel. Richey v. Smith*, 42 Wash. 237, 84 Pac. 851, 114 Am. St. 114, 5 L. R. A. (N. S.) 674, wherein the laws providing for licensing and regulating horseshoers and plumbers were held unconstitutional. A reading of those decisions, however, will show that those laws were held unconstitutional not because of the mere charge of a license fee, but because of other limitations put upon those desiring to enter those occupations. All persons are free to operate a vehicle for hire upon the streets of Seattle by the mere payment of the fee prescribed. Had that been the only qualification required of horseshoers and plumbers under those acts, it is manifest from the decisions we have noticed that the decisions in those two cases would have been different.

The judgment is affirmed.

GOSE, CHADWICK, and MOUNT, JJ., concur.

[No. 11252. Department One. July 10, 1913.]

THE STATE OF WASHINGTON, *Respondent*, v. H. A. NEIS,
Appellant.¹

APPEAL—REVIEW—EXCEPTIONS. Error in instructions can be reviewed on appeal only when exceptions thereto were brought to the attention of the trial court before disposing of a motion for a new trial, and it is not enough that exceptions were served and filed in the cause.

CRIMINAL LAW—TRIAL—APPEAL—HARMLESS ERROR. The defendant cannot predicate error upon improper conduct of the court in that, on sustaining objections to examination by defendant's counsel, a remark was made suggestive of improper relations of the defendant, when it was not any more so than the objectionable questions.

¹Reported in 133 Pac. 444.

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Appeal from a judgment of the superior court for King county, Ronald, J., entered October 26, 1912, upon a trial and conviction of larceny. Affirmed.

William R. Bell, for appellant.

John F. Murphy, Crawford E. White, and Reah M. Whitehead, for respondent.

PARKER, J.—The defendant was charged with the crime of grand larceny, by information filed in the superior court for King county. A trial resulted in verdict and judgment of conviction, entered on September 30, 1911, from which he appealed to this court. That judgment was reversed upon hearing in this court because of error occurring in the trial. Our decision upon that appeal may be found in 68 Wash. 599, 123 Pac. 1022. The case being remanded to the superior court, a new trial was had, when the defendant was again found guilty by the verdict of the jury, and judgment entered thereon accordingly. From that judgment, he has again appealed to this court.

Contentions are made by counsel for appellant rested upon alleged errors of the trial court in giving its instructions to the jury. It is insisted, however, by counsel for the state, that such contentions cannot be considered in this court for want of proper exception being taken to the alleged erroneous instructions before the disposition of the motion for a new trial in the superior court. It appears from the record before us that, a few days after the trial and rendition of the verdict, counsel for appellant filed in writing exceptions to the instructions, not having theretofore in any manner taken any exceptions thereto. These written exceptions were served upon counsel for the state, and filed with the papers in the case on the day the motion for new trial was overruled. There is nothing in the statement of facts indicating that these or any other exceptions to the instructions were ever called to the attention of the trial judge, nor is there any notation

upon the exceptions, or elsewhere in the record, by the trial judge indicating that they were ever called to his attention. Under the statute and our previous decisions, it is clear that these exceptions were not taken and placed of record in such manner as to entitle appellant to have reviewed the alleged error of the trial court in giving the instructions complained of. Rem. & Bal. Code, § 339 (P. C. 81 § 587); *Coffey v. Seattle Elec. Co.*, 59 Wash. 686, 109 Pac. 202; *Gerber v. Aetna Indemnity Co.*, 61 Wash. 184, 112 Pac. 272; *White v. Ratliff*, 61 Wash. 383, 112 Pac. 502; *State v. Peebles*, 71 Wash. 451, 129 Pac. 108.

It is manifest from these holdings that, in order to call for review of alleged error of the trial court in giving instructions to the jury, the record must affirmatively show that such exceptions were brought to the attention of the trial judge before disposing of the motion for a new trial. A mere serving of written exceptions upon opposing counsel and filing the same with the papers in the case is not sufficient to show that they were brought to the attention of the trial judge. We conclude that the alleged error of the trial court in giving the instructions complained of in this case is not reviewable by us.

It is contended that certain remarks of the trial judge during the progress of the trial constitute such prejudicial error against appellant as to entitle him to a new trial. Appellant was accused of stealing a certain gold chain from a Mrs. Ryan, the prosecuting witness. During her cross-examination, counsel for appellant sought to show that she had been divorced, and we think the following cross-examination on that subject suggests the thought of possible improper relations between the prosecuting witness and appellant.

“Mr. Bell: Q. You got your divorce, didn’t you? A. Yes, sir. Q. And got it in this court? A. Yes, sir. Q. And the ground on which you got your divorce was that your husband had made accusations against you that bore on your chastity in reference to this very case? Mr. White: I object to that as incompetent. The Court: Sustained.”

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After further cross-examination of considerable length, the following occurred:

"Mr. Bell: Q. Mrs. Ryan, you have been supporting yourself and your children for the last several months? A. I certainly have. Q. Without any assistance from your husband? A. I get assistance from my husband. Q. Who supports the children? Mr. White: Are we trying the divorce case? The Court: I don't see what that has to do with this. Mr. Bell: I am offering it now in lieu of the papers I tried to introduce this morning. The Court: Objection sustained. I am going to instruct this jury that the relations of these two parties, if there is any such relation, can only be considered for one purpose only, and it could not be for that purpose—for the purpose of impeachment unless you go further and show what the supreme court says you have to show. If this man stole that chain he is just as much guilty of larceny, no matter what their relations were or what her character is, as though he stole it from any other person in the world. Mr. Bell: We now desire to take an exception to the court's remarks for the reason that they are prejudicial to the defense, specially prejudicial before the testimony has been placed in by the defendant."

This last remark of the court is the matter complained of as being prejudicial. While we regard this remark as somewhat unfortunate, yet in view of the manner in which it was invited by cross-examination on the part of counsel for appellant, we do not think it is of sufficient seriousness to call for a new trial. Apparently whatever suggestion there was in all of this, touching the improper relationship between appellant and the prosecuting witness, was brought on by questions asked by counsel for appellant. We are unable to see that the remarks of the court were any more suggestive of improper relations between the prosecuting witness and appellant than were the remarks of counsel.

Some contention is made in behalf of appellant rested upon the sufficiency of the evidence to sustain the verdict and judgment. We deem it sufficient to say that a review of the record convinces us that we would not be warranted in in-

terfering with the conviction upon that ground. Manifestly there is sufficient evidence, if believed by the jury, to sustain the conviction. The only substantial ground for argument touching the insufficiency of evidence is as to the credibility of witnesses, and in the light of this record we are clear that this question was for the jury.

Other suggested grounds of error, we think, are wholly without merit and do not call for discussion. We are constrained to affirm the judgment. It is so ordered.

MOUNT, GOSE, and FULLERTON, JJ., concur.

[No. 10846. Department One. July 10, 1913.]

LEVA GRIFFITH, *Appellant*, v. DANIEL GRIFFITH,
Respondent.¹

DIVORCE—APPEAL—REVIEW—FINDINGS. The action of the trial court in dismissing an action for a divorce in a doubtful case will not be disturbed on appeal, where the evidence is conflicting and the trial court heard and saw the witnesses.

DIVORCE—SUIT MONEY—AMOUNT—DISCRETION. The discretion of the trial court in denying attorney's fees and suit money in a divorce action, will not be disturbed on appeal except for abuse; and no abuse appears where, on dismissal of the action, the court allowed \$50 attorney's fees and \$25 suit money, there being property worth not to exceed \$5,000 subject to a large indebtedness.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered September 3, 1912, dismissing an action for divorce, after a hearing on the merits before the court. Affirmed.

Frank H. Kelley, for appellant.

Rickabaugh & McElroy and *Williamson, Williamson & Freeman*, for respondent.

GOSE, J.—This is an action for divorce, based upon alleged acts of cruelty on the part of the defendant. After a

¹Reported in 133 Pac. 443.

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Opinion Per Gose, J.

hearing upon the merits, the court dismissed the action. The plaintiff has appealed.

The appellant testified to acts of cruelty which, if the testimony is true, entitled her to a divorce. These acts were specifically denied by the defendant while upon the witness stand. Both sides are in a measure corroborated. In view of this fact, we do not feel warranted in disturbing the judgment of the trial court. In cases of this character the trial judge has a much better opportunity to arrive at the truth than has this court from a mere reading of the evidence. He saw the witnesses in action and had an opportunity to observe and test their prejudices. The testimony of either the plaintiff or the defendant is essentially false. A reading of the record has failed to convince us that the truth lies with the plaintiff. The policy of the law as reflected by the decisions of this court is to deny divorces in doubtful cases. *Bounds v. Bounds*, 23 Wash. 593, 63 Pac. 1134.

Error is assigned in that the trial court denied the appellant's motion for counsel fees and suit money at the time of the commencement of the action, and in denying her motion for reasonable counsel fees after the dismissal of the case. The code, Rem. & Bal., § 988 (P. C. 159 § 13), clothes the trial court with a discretion in these matters, which will not be reviewed except for abuse. *Arey v. Arey*, 22 Wash. 261, 60 Pac. 724; *Willey v. Willey*, 22 Wash. 115, 60 Pac. 145, 79 Am. St. 923; *Lee v. Lee*, 3 Wash. 236, 28 Pac. 355.

In the *Willey* case, the court said:

"The amount allowed as suit money and attorney's fees is peculiarly within the discretion of the superior court, and it does not appear that there was any abuse of that discretion in the order made."

In the *Lee* case, the court, in addressing itself to this question, said:

"And while we might not consider the whole sum awarded as reasonable, under the circumstances, if the question were left to our determination, still, the court having exercised its

discretion in the matter, we do not think its action should be here reviewed."

After the entry of the judgment of dismissal the court, on the application of the appellant, allowed her \$25 as suit money and \$50 as attorney's fees. The court found that the property was not worth to exceed \$5,000. The evidence shows a large indebtedness, some of it in the form of liens against the property. Upon the entire record, we are not prepared to say that there was an abuse of discretion.

The judgment is affirmed.

PARKER, CHADWICK, and MAIN, JJ., concur.

[No. 11220. Department One. July 10, 1913.]

ARIAN T. THOMAS, *Respondent*, v. G. W. LEE *et al.*,
Appellants.¹

APPEAL—BOND—FORM. A supersedeas bond on appeal conditioned to pay the judgment, fairly indicating that it is given on behalf of the appellants, is sufficient, on objection first made in the supreme court, although the wife of one of the principals did not join as a principal in the bond.

MONEY LENT—EVIDENCE—SUFFICIENCY. In an action for money lent to one acting for himself and as agent for another with whom he was alleged to be in business, findings for the plaintiff are sustained as to only the active party, where there was no proof of partnership or agency or that the alleged principal ever obtained or used the money.

COSTS — ON APPEAL — APPORTIONMENT. Where a judgment for plaintiff is affirmed as to one of the defendants and reversed as to the other defendant and wife, all the defendants appearing by the same counsel, the costs on appeal are properly apportioned by allowing the plaintiff one-half of his costs against the defendant held liable, and allowing the other defendant and wife one-half of their costs against the plaintiff.

Appeal from a judgment of the superior court for King county, Everett Smith, J., entered December 5, 1912, upon

¹Reported in 133 Pac. 446; 134 Pac. 510.

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Opinion Per CHADWICK, J.

findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for money lent. Affirmed in part and reversed in part.

Gates & Emery, for appellants.

Beechler & Batchelor, for respondent.

CHADWICK, J.—The notice of appeal in this case was given by each of the defendants, but the bond was signed by D. H. Lee and G. W. Lee only, as principals. The bond is in the form of a supersedeas, and is conditioned “That, whereas, the above named A. T. Thomas . . . recovered judgment against the above named defendants, . . . Now therefore, if the above named principals, D. H. Lee and G. W. Lee, shall pay to A. T. Thomas . . . all costs and damages . . . not exceeding the sum of \$200, and shall satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the supreme court may render or make, . . . then this shall be void . . .” etc.

No objection was taken to the form of the bond or to the sufficiency of the surety, in the court below, but a motion to dismiss the appeal is made upon the ground that Anna Lee, the wife of G. W. Lee, did not join as a principal in the bond. The bond is conditioned to pay the judgment; the objection, therefore, goes to the form rather than to the substance of the undertaking. We think the bond fairly indicates that it is given on behalf of all the appellants, and is within the spirit, if not the letter, of the case of *Fidelity & Deposit Co. v. Seattle, Renton & Southern R. Co.*, 50 Wash. 391, 97 Pac. 453. The only interest respondent can have in the bond is whether a recovery can be had upon it. No objection could be made by the surety, under the principle announced in *Yost v. Empire State Surety Co.*, 69 Wash. 397, 125 Pac. 167. The motion to dismiss the appeal is denied.

Respondent brought this action to recover the sum of \$520, alleged to have been loaned by him to the defendants for their

use and benefit. The amounts were paid by check, and it is alleged that "D. H. Lee and G. W. Lee were and now are in business together, the said D. H. Lee acting for himself and as agent for said G. W. Lee, and that said money so loaned to them by the plaintiff was loaned and used for the use and benefit of each." A bill of particulars itemizes the amounts loaned as follows: September 16, 1911, cash advanced to pay taxes, \$500. September 26, 1911, by check \$20.

A general power of attorney, dated October 24, 1911, given by G. W. Lee and Anna Lee to D. H. Lee, was offered by respondent to sustain his theory of agency. We find no other testimony tending to prove agency, and the slightness of this evidence is apparent when it is noted that the power of attorney is dated more than a month after the money alleged to have been loaned to pay taxes was paid to D. H. Lee. Respondent says that the money—we are now speaking of the \$500 item—was loaned to pay taxes on certain property owned by G. W. Lee. But there is no evidence, other than the power of attorney, to show agency, nor is there any evidence tending to prove that "D. H. Lee and G. W. Lee are now in business together," so as to sustain the finding of the court upon the theory of partnership. Nor does the record disclose the fact that the money was ever paid over in whole or in part to G. W. Lee, or that any taxes were paid with it, a fact which, if appearing, would tend to support plaintiff's theory of the case.

Following the frequently announced policy of this court, we are disposed to follow the finding and conclusion of the court that D. H. Lee borrowed the money, but we cannot hold, under the facts as they are disclosed in the record, that G. W. Lee and Anna Lee ever had any notice or knowledge of the loan, or that they obtained or used the money for the purpose specified, or for any other. We have not overlooked the admission of G. W. Lee that there were certain delinquent taxes and outstanding certificates on his land, but this fact

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is clearly insufficient when standing alone to sustain a judgment.

Appellants contend that if the proof of agency fails, no recovery can be had against D. H. Lee; this upon the ground that, where the agency is disclosed and no fraud is proven, the principal and not the agent is the proper party. *Wilson v. Wold*, 21 Wash. 398, 58 Pac. 228, 75 Am. St. 846. As we read the record, D. H. Lee is not sued as an agent, but as a principal, and if the evidence of the plaintiff is to be believed, he is severally liable for the repayment of the money borrowed.

As for the \$20 check, the evidence does not in any way connect G. W. Lee and Anna Lee with either its giving or receipt. If it represents a debt, it is that of D. H. Lee.

The case is affirmed as to D. H. Lee, and reversed and remanded for a new trial as against G. W. Lee and Anna Lee.

GOSE, MOUNT, and PARKER, JJ., concur.

ON RETAXING COSTS.

[Decided August 12, 1913.]

PER CURIAM.—An opinion was filed in this case on July 10, 1913, reversing the judgment as to G. W. Lee and wife and affirming it as to D. H. Lee; and subsequently, and more than ten days thereafter, the respondent Thomas and appellants G. W. Lee and wife filed cost bills, each claiming the entire costs incurred by them on the appeal, and excepting to the cost bill filed by the other. The matter of the taxation of the costs is now before the court for its decision upon a stipulation of counsel. Appellants all appeared by the same counsel.

The clerk, we find, has allowed Thomas one-half of his costs against D. H. Lee and has also allowed G. W. Lee and wife one-half of their costs against Thomas.

We find the costs to be properly apportioned.

[No. 11017. Department Two. July 10, 1913.]

THE STATE OF WASHINGTON, *Respondent*, v. CHRISTOPHER COLUMBUS, *Appellant*.¹

PROSTITUTION—ACCEPTING EARNINGS OF PROSTITUTE—INFORMATION. An information charging defendants with accepting the earnings of one M. B., a common prostitute, charges the offense practically in the language of the statute, Rem. & Bal. Code, § 2440, making it unlawful to live with, or accept any earnings of, a common prostitute, and is sufficient.

INDICTMENT AND INFORMATION—DUPLICITY. An information charging two persons with accepting the earnings of a common prostitute is not duplicitous when it charges both with a single crime.

WITNESSES—IMPEACHMENT. On cross-examination of a prosecutrix, on a prosecution for accepting the earnings of a common prostitute, evidence that she had subsequently lived with another man and paid him all her earnings is not admissible to impeach her testimony, she having admitted that she was a common prostitute.

SAME. Such evidence is not admissible on the theory that she was endeavoring to shield the other man, as her motive for testifying against the accused.

PROSTITUTION — ACCEPTING EARNINGS OF PROSTITUTE — EVIDENCE—CORROBORATION—SUFFICIENCY. On a prosecution for accepting the earnings of a common prostitute, corroboration of her testimony, within the requirement of Rem. & Bal. Code, § 2443, by another prostitute is sufficient; especially where other witnesses testified to payments and other circumstances tending to show the relations charged.

SAME—ACCEPTING EARNINGS—ELEMENTS OF OFFENSE. One renting rooms to a common prostitute is guilty of accepting her earnings, within Rem. & Bal. Code, § 2440, where, in addition to the room rent, he was paid a specific sum for the privilege of each act of prostitution committed on the premises.

CRIMINAL LAW—NEW TRIAL. Passion or prejudice, warranting a new trial, is not shown by the fact that the jury believed the evidence of the state, rather than conflicting evidence for the defense, where there was evidence to establish every element of the crime charged.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered June 25, 1912, upon a trial and

¹Reported in 133 Pac. 455.

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Opinion Per ELLIS, J.

conviction of accepting the earnings of a prostitute. Affirmed.

Coleman & Gable and Hurd & Hilen, for appellant.

Augustus Brawley, for respondent.

ELLIS, J.—The defendant was charged with the crime of accepting the earnings of a prostitute. The charging part of the information was as follows:

“That in Skagit county, state of Washington, and between the first day of December, 1911, and the first day of May, 1912, the said defendants, Christopher Columbus and Billie Liaskos, then and there being, did unlawfully and feloniously accept the earnings of one Mary Blakely, she, the said Mary Blakely, then and there being a common prostitute.”

The defendant demurred to the information, and the demurrer was overruled. He then pleaded not guilty and demanded a separate trial, which was accorded. At the close of the state's case, the defendant challenged the sufficiency of the evidence and asked an instruction of not guilty, which was denied. The evidence adduced by the state at the trial and relied upon for the conviction was, briefly, as follows. The defendant Columbus and his codefendant in the information, Liaskos, both natives of Greece, were cousins and partners conducting a restaurant and rooming house in Sedro-Woolley, Skagit county. The prosecuting witness, Mary Blakely, an admitted prostitute, testified that she rented a room in this place from about December 15, 1911, to March 31, 1912, paying the defendant and his partner therefor \$7 a week; that much of the time while she was there another prostitute shared the room with her, also paying therefor to the defendant and his partner \$7 a week; that the prosecuting witness plied her vocation by frequenting, in the afternoons and evenings, the boxes in the defendant's restaurant, and when men came in had drinks with them from an adjoining saloon, took them upstairs and practiced prostitution with

them for money; and that the defendant and his partner were paid for each man so accommodated a stipulated sum in addition to what she received; that the defendant sometimes brought men back to the boxes and introduced them to the prosecuting witness; that all of this was in pursuance of an agreement with the defendant Columbus and his partner that she would be permitted to take men upstairs only upon condition that such payments, designated as "room rent," were made; that this was in addition to the regular room rent paid by the woman for her room, and was paid whether the men were taken to the woman's room or to another; that these amounts were paid either by the woman with money given to her by the men or directly by the men themselves. Her testimony with regard to the charge for taking men to the rooms, the manner and amount of the payments, and the general arrangement with the defendant and his partner and mode of operation was corroborated by another inmate of the house, one Myrtle Delaney, the woman who for a time shared the regular room of the prosecuting witness. There was also evidence that there were other female inmates of the place during this time, but under what arrangement with the proprietors did not appear. Other evidence will be noticed as may be necessary in the course of this opinion. Upon the whole evidence and the court's instructions, the jury returned a verdict of guilty as charged.

All of the evidence introduced by the state was strenuously contradicted by the defendant and his partner, but it is elementary that, if the state's evidence was sufficient to take the case to the jury, the verdict is conclusive upon us. The defendant moved to set aside the verdict and for a new trial. The motion was denied. The defendant moved in arrest of judgment, which was also denied. Exceptions were reserved to these rulings and to the admission and exclusion of evidence. Judgment was entered, sentence pronounced, and the defendant appealed.

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Opinion Per ELLIS, J.

I. The appellant first assigns as error the refusal of the court to sustain the demurrer to the information. The demurrer was upon the grounds, (1) that the information did not substantially conform to the statute; (2) that it charged more than one crime; (3) that the facts charged did not constitute a crime. The statute under which the information was filed, so far as material, reads as follows:

“Every person who . . . shall live with or accept any earnings of a common prostitute, or entice or solicit any person to go to a house of prostitution for any immoral purpose, or to have sexual intercourse with a common prostitute, shall be punished by imprisonment in the state penitentiary for not more than five years or by a fine of not more than two thousand dollars.” Rem. & Bal. Code, § 2440, subdiv. 5 (P. C. 135 § 375).

A reading of this statute makes it plain that the information charged the crime practically in the words of the statute, so far as applicable to the facts. While it charged the offense as being committed by two persons, it charged but a single crime, and was therefore not vulnerable to attack for duplicity. It is manifest also that the facts charged, if proven, constitute a crime under the express terms of the statute. The demurrer was properly overruled.

II. On cross-examination of the prosecuting witness and also other witnesses, who it is claimed heard her so state, the appellant sought to prove that the prosecuting witness had, subsequent to leaving the appellant's place, lived with another man and paid him all of her earnings. The exclusion of this evidence is assigned as error. The appellant contends that it was admissible, first, as affecting the credibility of the witness, and second, as tending to show, as a motive on her part in accusing the defendant, an intent to protect the other man by diverting attention from him and a like offense with which he was also charged. Neither of these grounds is well taken. So far as the credibility of the prosecuting witness could be affected by evidence of her unchastity and immoral-

ity, that evidence had already been admitted. She was a common prostitute and had so testified. Evidence that she lived with another man, even at the time charged in the information, unless she paid all of her earnings to such other man, would be at most only cumulative as to her unchaste character and would not otherwise tend to discredit her testimony. The court excluded the testimony on the ground that it referred to a time subsequent to her leaving the defendant's place, and did not tend to show that she paid all of her earnings to another during the time she remained at the defendant's place. There was no error in excluding the evidence on the first ground of the offer.

The second ground, namely, that the evidence was admissible as tending to show, as a motive, a diversion of attention from the offense charged against the other man, seems to us also untenable. The appellant relied mainly upon the case of *State v. Griffin*, 43 Wash. 591, 86 Pac. 951, in which it was the theory of the defense that the complaining witness charged the crime of statutory rape against the defendant in order to protect the real offender, and the court limited the consideration of the evidence of illicit relations with another to its tendency to account for her condition when examined by a physician, thus taking the theory of the defense from the jury. This was held error. The distinction between that case and this is patent. The fact that the complaining witness in the *Griffin* case had voluntarily submitted to illicit relations with another man than the defendant had some tendency to prove that the charge against the defendant was for the purpose of protecting the real culprit. The evidence offered in the case at bar would have no such tendency. The charge of the complaining witness that she paid a part of her earnings to the appellant would in no wise tend to disprove the fact, if it be a fact, that she, at a subsequent time, paid all of her earnings as a prostitute to another man. The evidence had no reasonable tendency to establish motive for the charge against the defendant. It was properly rejected.

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III. It is next contended that the testimony of the prosecuting witness that the appellant had accepted any of her earnings was uncorroborated. The witness Myrtle Delaney corroborated the prosecuting witness in nearly every particular. The appellant contends that, because the Delaney woman was also an admitted prostitute, her evidence was not admissible. This, however, went to the credibility of her testimony rather than to its admissibility. *State v. Stone*, 66 Wash. 625, 120 Pac. 76. The statute touching corroboration, Rem. & Bal. Code, § 2443 (P. C. 135 § 381), does not render the testimony of a prostitute inadmissible. Nor does the fact that the Delaney woman also claimed to have been subjected to the same exactions as the prosecuting witness during her stay at the appellant's place render her testimony inadmissible in corroboration. *People v. Panyko*, 71 App. Div. 324, 75 N. Y. Supp. 945. Moreover, another witness testified that he on several occasions had paid money, either to the appellant or his partner, for going to the room with the prosecuting witness. Other witnesses testified to seeing the prosecuting witness around the restaurant and the lodging house, and there was also evidence tending to show that when the prosecuting witness had been arrested and was in jail for disorderly conduct with another man, the defendant sent her money. We think there was ample evidence in corroboration of the complaining witness to satisfy the statute. Its weight was for the jury.

IV. The court gave the following instructions:

"You are instructed that the crime of accepting the earnings of a prostitute is not committed by the acceptance of the earnings of a prostitute in exchange for food; clothing or shelter; but is only committed by the acceptance of such earnings as a gratuity, or with the intent to aid, assist or abet in her prostitution.

"But you are instructed that if you believe from the evidence beyond a reasonable doubt, that Mary Blakely, who is mentioned in the information, was, during the period mentioned in the information, a prostitute, and that the defend-

ant Christopher Columbus knowing her to be such and he himself or in partnership with Billie Liaskos was in charge of rooms and did enter into arrangement with the said Mary Blakely for her to use any such room or rooms for the purpose of holding intercourse with men, and to pay the said Christopher Columbus, or the said partnership, if one existed, the sum of fifty cents, or any other amount, for the use of such rooms for every man that she occupied such room with, then you are instructed that such sum received for the use of such rooms would be money received as the earnings of a prostitute, and you should find the defendant guilty as charged in the information."

The appellant contends that the latter of these instructions is erroneous, in that charging for the use of rooms to be used in prostitution does not constitute accepting the earnings of a prostitute within the meaning of Rem. & Bal. Code, § 2440 (P. C. 135 § 375), above quoted. It is argued that if it constitutes any offense, it is either that of keeping a house of ill-fame, under Rem. & Bal. Code, § 2904, or that of maintaining a common nuisance, under Rem. & Bal. Code, §§ 8319 and 8320 (P. C. 135 §§ 1551, 1553). It is true that the evidence did tend to bring the defendant within the purview of these sections, but it also went much further. Keeping a house and renting rooms therein to prostitutes for their home and shelter, even with knowledge that they ply their vocation therein, where the only consideration paid is the stipulated room rent, regardless of the number of men entertained by the tenant, may be assumed for the purpose of this discussion merely to constitute the offense of keeping a house of ill fame or maintaining a common nuisance, and punishable as such only under the three last cited sections of the code; but the evidence here, if believed, shows not only the case we have assumed, but something more and very different from the case assumed. The distinction was recognized by the trial court, and is clearly apparent from a comparison of the two instructions above quoted.

The evidence here shows a direct participation by the ap-

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pellant in the negotiations for, and in the payment made in consideration of, each separate act of prostitution. The extra payment over and above the ordinary room rent of the prostitute was not room rent in any just sense of the term. It was pay in a specific sum for the privilege of each specific act of prostitution committed by the prostitute on the premises, whether performed in the prostitute's own room or, if more convenient, in another. The use of the room for which this extra payment was exacted was merely incidental to the particular act of prostitution. The sole moving consideration to the prostitute's customer, whether paid directly to the appellant by the customer or by the prostitute with money received from her customer, was the specific act of prostitution then performed by her. She earned it to the same extent and by the same act by which she earned the money paid to her for the same performance. The acceptance of it by the defendant was the acceptance of a part of her earnings as a common prostitute. It was a tribute levied on her earnings in consideration of prostitution alone. This is clear, since it was exacted whether she used her own room for which she had already paid or another for the specific act. It clearly falls within the ban of the statute against accepting "any earnings of a common prostitute." Any other view would render the statute so easily evaded by the shallow subterfuge of room rent as to make it a dead letter. We find no error in this instruction as applied to the evidence.

V. These considerations effectually dispose of the further claim that the court erred in refusing to direct an acquittal for insufficiency of the evidence to establish the crime charged, and also of the claim of error in the court's refusal to grant the appellant's motion in arrest of judgment.

VI. The motion for new trial was based upon grounds as follows: (1) error of law occurring at the trial excepted to by the defendant; (2) that the verdict was contrary to the law and the evidence; (3) misconduct of the jury consisting of passion and prejudice; (4) fatal variance between

the allegations of the information and the proof. What we have already said disposes of all of these grounds save the third, and that is not sustained by the record. It was the province of the jury to weigh the evidence. The testimony of the prosecuting witness tended to establish every element of the crime charged. It was so amply corroborated as to leave no doubt of its truth if the other witnesses for the state were believed. Their credibility was for the jury. If the jury-men believed this evidence, it was their duty to convict. That they did believe it is no mark of passion or prejudice and none other is pointed out. The trial court having denied the motion in arrest of judgment and refused a new trial, we must decline to interfere. *State v. Bailey*, 31 Wash. 89, 71 Pac. 715; *State v. Murphy*, 15 Wash. 98, 45 Pac. 729; *State v. Kroenert*, 13 Wash. 644, 43 Pac. 867; *State v. Coates*, 22 Wash. 601, 61 Pac. 726; *State v. Bailey*, 67 Wash. 336, 121 Pac. 821; 12 Cyc. 906, 907, 908.

The judgment is affirmed.

MORRIS, MAIN, and FULLERTON, JJ., concur.

[No. 10900. *En Banc*. July 10, 1913.]

JAHN CONTRACTING COMPANY, *Respondent*, v. THE CITY OF SEATTLE *et al.*, *Appellants*.¹

MUNICIPAL CORPORATIONS—CHARTERS—MINIMUM WAGE ON LOCAL IMPROVEMENTS—PUBLIC UTILITIES. A "local improvement" within the meaning of a charter amendment fixing a minimum wage to be paid by contractors performing any local improvement work for the city, has reference to a public improvement which, by reason of its being confined to a locality, enhances the value of adjacent property as distinguished from general benefits from public utilities; and hence has no application to the construction of a municipal railway system built upon the credit of the whole city.

Appeal from a judgment of the superior court for King county, Main, J., entered August 26, 1912, upon findings in

¹Reported in 133 Pac. 458.

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Opinion Per MOUNT, J.

favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for an injunction. Affirmed.

James E. Bradford, Melvin S. Good, and Ralph S. Pierce,
for appellants.

West & Wright, for respondent.

MOUNT, J.—This action was brought by the plaintiff to enjoin the city of Seattle and its board of public works from forfeiting and canceling a contract for the construction of a railway within the city limits. On the trial of the case, judgment was entered in favor of the plaintiff. The defendants have appealed from that judgment.

The facts are not in dispute and are briefly as follows: On January 9, 1911, the city council regularly passed an ordinance by which it was proposed to construct a street railway system within the city of Seattle and to pay for the same by the issuance of bonds of the city, which bonds were to be a general indebtedness of the city. On or about March 7, 1911, at an election duly called for that purpose, the electors voted favorably to the issuance of these bonds and approved the said ordinance. In pursuance thereof the city council thereafter passed an ordinance which authorized the board of public works to call for bids for the construction of a section of the street railway system to be known as "division A." On or about December 13, 1911, the board of public works called for bids for the construction of said "division A," by publishing notice as required by the city charter, which notice stated that bids would be opened on January 12, 1912. The plaintiff thereupon bid for the construction of "division A" of said street railway and filed its bid with the board of public works, together with a certified check for \$7,700, as required by §§ 14 and 15 of article 8 of the charter of the city. Said § 15 reads as follows:

"At the time and place named such bids shall be publicly opened and read; no bid shall be rejected for informality, but

shall be received if it can be understood what is meant thereby. The board shall proceed to determine the lowest bidder, and may let such contract to such bidder, or, if in their opinion all bids are too high, they may reject all of them and re-advertise, and in such case all checks shall be returned to the bidders; but if such contract be let, then and in such case all checks shall be returned to the bidders except that of the successful bidder, which shall be retained until a contract be entered into for making such improvement between the bidder and the city in accordance with such bid. If the said bidder fails to enter into such contract in accordance with his bid within ten days from the date at which he is notified that he is the successful bidder, the said check and the amount thereof shall be forfeited to the city, and the secretary shall deliver said check to the city comptroller, who shall draw said amount and pay the same into the city treasury, to the credit of the 'local improvement fund,' and the board shall re-advertise for proposals for such work. Neither the board nor the city council shall have power to remit such forfeiture."

On January 12, 1912, all bids made for the construction of the work on said "division A" were opened. Plaintiff's bid was the lowest of all bids submitted, it being \$148,927.20. Thereupon the certified checks of all other bidders were returned and the certified check of the plaintiff was retained. Thereafter the plaintiff was at all times ready and willing to execute a formal written agreement with the city of Seattle to construct the work in accordance with said bid. Thereafter, on March 5, 1912, the electors of the city of Seattle, at a regular election, adopted an amendment to the charter, which provides as follows:

"Minimum wage to be paid on local improvement work: Every contractor and subcontractor performing any local improvement work for the city of Seattle shall pay or cause to be paid to his employees on such work not less than the current rate of wages paid by the city of Seattle for work of like character and in any event not less than two and seventy-five hundredths (\$2.75) dollars per day. Said contractor and subcontractor shall, on such work, give preference to resi-

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dent laborers. This article shall be enforced by the city council by ordinance." Seattle charter, art. 23, § 2.

This amendment became effective about March 8, 1912.

On June 28, 1912, the contract for the construction of said "division A" was formally awarded to the plaintiff by the board of public works, and on July 8, 1912, a formal written contract was executed by the plaintiff and the board of public works for the construction of the work. The plaintiff gave a bond to secure the faithful performance of the contract. Thereafter, under and by virtue of the contract, the plaintiff commenced the construction of the railway system in accordance with the terms and conditions of the contract, prosecuting the work up to the time this action was brought. In doing so the plaintiff was required to engage a large number of laborers. Plaintiff did engage men to work upon the construction of the railway under an agreement to pay the laborers two dollars per day of eight hours. The going and prevailing wage in the city of Seattle for this class of work ranged from \$2 to \$2.25 for eight hours. The laborers were willing to accept \$2 per day for said work. While the work was in progress, the board of public works served notice upon the plaintiff to the effect that plaintiff was paying the employees engaged upon said work a sum as wages substantially less than \$2.75 per day, as provided in the amendment to the city charter, and directed the plaintiff to appear before the board of public works on the 9th day of August, 1912, and show cause why the contract should not be forfeited and canceled for that reason. Thereupon this action was brought to restrain the city and the board of public works from carrying this threat into effect.

Two questions are presented upon this appeal: First, Is the amendment to the city charter above quoted valid? Second, Is the contract in question controlled by that amendment? More than 150 pages of appellant's opening and reply briefs are devoted to a discussion of the first question. For the purposes of this case it may be conceded that the

amendment is valid, and we shall not further notice that question.

It will be noted that the amendment under consideration applies only to "*local improvement work*." At the time this amendment was passed, and ever since that time, the term "local improvement work" has had a clearly defined and well understood meaning. Chapter 98 of the Laws of 1911 is a chapter relating to local improvements in cities and towns. This chapter, at page 442, § 6, authorizes cities and towns to make certain local improvements which are enumerated therein, and to assess the cost thereof upon the property specially benefited. The general definition of "local improvement" is:

"A local improvement, within the meaning of the statute, is a public improvement which by reason of its being confined to a locality, enhances the value of adjacent property, as distinguished from benefits diffused by it throughout the municipality." *Chicago v. Blair*, 149 Ill. 310, 36 N. E. 829, 24 L. R. A. 412.

See, also, Black's Law Dictionary (2d ed.), p. 598, and cases there cited. And the cost of such improvement may be assessed to the property specially benefited. *Seanor v. Board of County Com'rs*, 13 Wash. 48, 42 Pac. 552; *Smith v. Seattle*, 25 Wash. 300, 65. Pac. 612.

It is plain, we think, that the work here undertaken was not local improvement work. This railway system was being built upon the credit of the whole city. The city was authorized to build it under the provisions of Rem. & Bal. Code, 8005 (P. C. 77 § 1073), as a "public utility" which is required to be ratified by the qualified voters of a city at a general or special election. Rem. & Bal. Code, § 8006 (P. C. 77 § 1075). It seems plain, therefore, that this railway was a public utility and was being built as such and cannot be said to be local improvement work. The contract is therefore not controlled by the charter amendment quoted, and the lower court properly

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restrained the city from interfering with the work under the contract.

The judgment is therefore affirmed.

CROW, C. J., CHADWICK, ELLIS, MORRIS, PARKER, FULLERTON, and GOSE, JJ., concur.

MAIN, J., took no part.

[No. 11079. Department One. July 11, 1913.]

Bo SWEENEY, *Respondent* v. LEWIS CONSTRUCTION COMPANY,
Appellant.¹

APPEAL—REVIEW—FINDINGS. Findings abundantly sustained by the evidence will not be disturbed on appeal, although the evidence is conflicting.

INTEREST—DAMAGES—UNLIQUIDATED DAMAGES. Interest is properly allowed from the time of the commencement of an action for damages to property by breach of a regrading contract, although unliquidated.

Appeal from a judgment of the superior court for King county, Tallman, J., entered October 22, 1912, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Preston & Thorgrimson and *Turner & Hartge*, for appellant.

Dorr & Hadley, for respondent.

MOUNT, J.—This is the second appeal in this case. When it was here before, upon the appeal of this same appellant, we reversed the case upon the question of damages and sent it back for a new trial between the respondent and the appellant. In the opinion upon that appeal we said:

“The appellant corporation was entitled to have that measure of damages applied which would protect it and which at

¹Reported in 133 Pac. 441.

the same time would fully compensate respondent for any actual loss he may have sustained . . . In other words, only such changes in values should be considered as were produced by, or directly resulted from the partial performance of the work of regrading." *Sweeney v. Lewis Construction Co.*, 66 Wash. 490, 119 Pac. 1108.

So that the only question to be determined upon the retrial was the amount of damages. The cause was retried upon that question. The trial court found that the appellant had damaged the respondent's property in the sum of \$3,900, to which was added interest from the date the suit was brought, amounting in all to \$4,558.45, for which amount a judgment was entered against the appellant. This appeal followed.

It is argued by the appellant that the damages allowed are excessive; that there was no depreciation or damage to the land; and that the allowance of interest was error.

Upon the second trial, it was stipulated that the evidence introduced at the first trial should be considered upon the second; other evidence also was produced. The facts are fully stated in the former opinion of this court, which will be found in 66 Wash., beginning at page 490. It is unnecessary to restate the facts at this time.

Counsel for appellant now contend that the damages found by the trial court upon the last trial were \$2,000 to the houses which were located upon the property, and \$1,000 to the lots. It is true the trial court, in rendering his oral decision in the case, stated the damages as contended for by the appellant; but the formal finding was to the effect that the property was damaged in the sum of \$3,900. It is argued by the appellant that the five dwellings which were located upon the property were not worth \$2,000, according to the preponderance of the evidence, and therefore that the court erred in finding that amount to be the damages for the destruction or partial destruction of the houses. It is also argued by the appellant that there is no evidence to show that the lots themselves were damaged in the sum of \$1,000. These two ques-

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tions depend entirely upon the facts. A cursory reading of the record convinces us that there is abundant evidence in the record to justify the finding of the court that the property was damaged by the appellant in the sum stated. There was much dispute among the witnesses upon the facts; but there is certainly sufficient to support the finding of the trial court thereon. It is apparently conceded by the appellant that the \$900 loss of rents for the houses was proper.

Appellant also argues that the court erred in allowing interest, for the reason that the damages were entirely unliquidated and could not be determined by mere computation. We are satisfied, however, that interest was properly allowable under the rule in *Eilers Music House v. Hopkins*, 73 Wash. 281, 131 Pac. 838; *Gray v. Reeves*, 69 Wash. 374, 125 Pac. 162; *Parks v. Elmore*, 59 Wash. 584, 110 Pac. 381.

The judgment is therefore affirmed.

CHADWICK, PARKER, and GOSE, JJ., concur.

[No. 11074. Department Two. July 12, 1913.]

KATHRINA NORDGREN, *Respondent*, v. JOHN LAWRENCE,
Appellant.¹

LANDLORD AND TENANT—ACTIONS—PLEADING—VARIANCE—MATERIALITY. In an action against a landlord, it is an immaterial variance, if any, that the complaint alleged that plaintiff was "seised and possessed and entitled to the possession" of premises, and the proof showed that she was a tenant from month to month, where the defendant knew the character of the possession.

LANDLORD AND TENANT—LEASE—TERMINATION. A tenancy from month to month is not terminated on the 28th of August, where the lease was made June 11th at which time it was not known when the tenancy would begin, the receipt for rent deposited recited that the rent was to commence about the 28th of the month, and the tenant moved in July 3d, and had fully paid for the second month.

¹Reported in 133 Pac. 436.

LANDLORD AND TENANT—DAMAGES—ACTIONS—REMEDIES BY TENANT. An action for damages against a landlord who unlawfully entered the premises before the termination of the tenancy and made a general nuisance of himself need not be brought under the unlawful detainer statute.

DAMAGES—MENTAL SUFFERING. Recovery may be had for mental suffering which was the result of the wrongful acts of the defendant in an unlawful entry upon plaintiff's premises, although there was no actual physical injury.

LANDLORD AND TENANT—DAMAGES—EXCESSIVE VERDICT—MENTAL SUFFERING. A verdict for \$1,000 damages is excessive, and should be reduced to \$500, where plaintiff, who was ill, was greatly disturbed and frightened when the defendant, her landlord, unlawfully forced an entrance into the house early in the morning, and made a general nuisance of himself until late in the afternoon, her fright was only temporary, and her illness not augmented.

Appeal from a judgment of the superior court for King county, Everett Smith, J., entered November 6, 1912, upon the verdict of a jury rendered in favor of the plaintiff for \$1,000, in an action in tort. Reversed, unless \$500 is remitted.

Frank E. Green, for appellant.

Thos. H. Bain, for respondent.

MORRIS, J.—Respondent brought this action to recover damages suffered by her because of certain acts of appellant while with her family she was occupying a furnished house belonging to appellant. The pertinent facts are these:

Respondent and her family had occupied the house since July 3d, as a tenant from month to month. On August 26, appellant was informed that respondent would not occupy the house the third month. About eight o'clock on the morning of August 28, appellant, by the use of a ladder, climbed upon a back porch extending out from the second story, and forced open a door leading from the porch into a bedroom then occupied by a daughter of respondent, who had just risen and was not yet dressed. This daughter, whose age is not given, ran to the room of an older sister, who came

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and ordered appellant out of the room. He left, and the door was shut and locked. Appellant then effected an entrance into the room through a window, and took the door from its hinges. He then went through the house and attempted to enter the bedroom occupied by the respondent, but was prevented from doing so by other members of the family. Appellant then proceeded to make a general nuisance of himself, entering all the rooms into which he could gain entrance, opening cupboards and closets, removing electric light bulbs, turning off the water and gas, and creating a general disturbance until about five o'clock, when he left at the suggestion of a police officer. At the time, respondent was in ill health and was greatly disturbed by these acts of appellant until sometime in the afternoon, when she was taken from the house. She subsequently brought this action, in which she obtained a verdict for one thousand dollars; and appellant, alleging various errors, appeals.

Appellant first complains that certain instructions to the jury were erroneous. He contents himself with alleging error, but points out no vice in the instructions, nor reason why his claim of error should be sustained. Having read them, no suggestion presents itself to our mind why they should be held erroneous, and they are sustained.

It is next contended that the action should have been dismissed because of a variance between the amended complaint and the proof. The amended complaint alleged the respondent was "seised and possessed and entitled to the possession of said house and premises." The proof showed a tenancy from month to month. While the word "seised" is ordinarily used to express the owner's possession of a freehold estate, we fail to see how the appellant could be misled by this allegation. He certainly knew the character of respondent's possession of the premises, and the variance complained of in the pleading could not have misled him in maintaining his defense. If we assume there was a variance, it was not material. Rem. & Bal. Code, § 299 (P. C. 81 § 287).

It is next contended that the tenancy had expired. We think not. When the premises were first rented on June 11, it was not known what time the tenancy would commence. The receipt for the rent deposited reads, "rent to commence about the 28th of this month." Respondent moved in on July 3d. The rent was fully paid, and there can be no doubt but that respondent was in lawful possession of the premises on August 28th.

The next contention is, that the action should have been brought under the forcible entry and detainer statute. There is no merit in this contention and no discussion of it is necessary.

The next assignment is that there was no proof of damages, and that there could be no recovery for respondent's mental distress. Whether or not an action will lie for mental distress alone, when unaccompanied by injury to person or property, need not here be discussed. Such a question is not present in this case. In this state mental suffering may be taken into consideration in assessing damages, where the same is a result of a wrongful act, even though there be no actual physical injury. *Willson v. Northern Pac. R. Co.*, 5 Wash. 621, 32 Pac. 468, 34 Pac. 146; *Davis v. Tacoma R. & Power Co.*, 35 Wash. 203, 77 Pac. 209, 66 L. R. A. 802.

Other assignments are the denial of judgment and motion for new trial. There was no error in denying the motion for judgment. The motion for new trial included, among other questions, a claim that the verdict was excessive, thus presenting that question here. In discussing this assignment, no reference need be made to the reprehensible conduct of appellant. It speaks for itself. In this state, however, vindictive damages are not allowed; and upon this assignment of error we must look to the nature of the injury suffered by respondent to determine whether or not more than compensatory damages have been allowed. Respondent was in ill health at the time, and the only thing she complains of as a result of appellant's actions is that she was greatly disturbed

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and frightened. There is no evidence that her illness was augmented as a result of appellant's actions, or that her disturbance and fright was more than temporary, and much as appellant deserves censure for his conduct while in the house occupied as it was only by women and a young lad, the jury could not visit that censure upon him except as they could determine the amount of damages that would compensate respondent. We think \$500 is ample compensation for the injury to respondent.

The judgment is reversed, and if within thirty days from the going down of the remittitur, respondent shall accept judgment for \$500, the judgment so entered will stand; otherwise a new trial is ordered. No costs to either party in this court.

ELLIS, FULLERTON, and MAIN, JJ., concur.

[No. 11091. Department One. July 12, 1913.]

J. SPENCER PURDY, *Respondent*, v. E. B. SHERMAN,
Appellant.¹

HIGHWAYS—USE — NEGLIGENT DRIVING — OWNERSHIP OF VEHICLE—QUESTION FOR JURY. In an action for damages caused by an automobile, ownership of the automobile establishes *prima facie* that it was driven for and in the possession of the owner, making a question for the jury, although the driver testified that he was operating it upon an independent percentage basis.

SAME—DAMAGES—SPECULATIVE DAMAGES. In an action for injuries sustained by a physician in an automobile collision, plaintiff's loss of a prospective surgical operation which he was hindered from performing is too remote and speculative to form the basis of a recovery.

TRIAL—VERDICT—IMPEACHMENT AND EXPLANATION—AFFIDAVIT OF JUROR. Where, in an action for damages, the evidence and instructions improperly submitted to the jury an item which was too remote and speculative to form the basis of a recovery, the error cannot be

¹Reported in 133 Pac. 440.

shown to be harmless by an affidavit of a juror that the item was not considered, as it would show disobedience to the instructions and be an impeachment of the verdict.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered November 11, 1912, upon the verdict of a jury rendered in favor of the plaintiff, for damages sustained in an automobile collision. Modified.

E. C. Dailey, for appellant.

Faussett & Smith, for respondent.

CHADWICK, J.—An automobile, driven by one Thomason but owned by the defendant, was carelessly driven into a machine driven and owned by plaintiff. Plaintiff brought this action to recover for personal injuries suffered, for damage to the machine, and for some special damages. A verdict was returned in favor of the plaintiff for \$585, and defendant has appealed.

The principal error assigned is that the verdict is contrary to the law and the evidence, and that a motion for an instructed verdict should have been sustained. The defense was that the machine was operated by Thomason upon an independent percentage basis; that he was a principal and not the agent of the defendant. The evidence offered by defendant might have sustained a verdict in his favor, but under repeated decisions of this court the jury was not bound to believe such testimony, the ownership of the automobile being admitted to be in the defendant.

“In cases of this kind, where it is shown that the wagon and team doing damages belonged to the defendants at the time of the injury, that fact establishes *prima facie* that the wagon and team were in possession of the owner, and that whoever was driving it was doing so for the owner.” *Knust v. Bullock*, 59 Wash. 141, 109 Pac. 329.

See, also, *Kneff v. Sanford*, 63 Wash. 503, 115 Pac. 1040; *Burger v. Taxicab Motor Co.*, 66 Wash. 676, 120 Pac. 519. Whether the *prima facie* case made by the respondent was

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overcome was a question for the jury, and it has decided that it was not.

One of the items of damage claimed is the loss of a certain surgical operation. Respondent is a physician and surgeon, and conducts a hospital near the town of Sultan. This is objected to as an improper element of damage, and in support of his motion for a new trial appellant has submitted the affidavit of the prospective patient or subject showing that it is extremely improbable that respondent suffered any loss on this account. The operation was prospective, and its performance, under respondent's own testimony, would be so speculative and uncertain as to afford no proper foundation for an assessment of damages.

Respondent does not seriously contend that this item can be lawfully recovered, but meets the argument of appellant with an affidavit signed by one of the jurors in which it is said that the loss of the surgical operation was not considered by the jury, and that it was not included in the verdict. Respondent then insists that, inasmuch as he claimed a greater sum than was allowed by the jury, the error, if any, was harmless.

The law will presume in aid of a verdict that all matters testified to and submitted by the court to the jury were considered, and this presumption cannot be overcome by the affidavit of a juror. The issue inheres in, and becomes a part of the verdict. To put verdicts upon issues properly submitted at the mercy of a juror, or to make them subject to explanation, would make trials by jury useless, for if jurors can disobey the instructions of the court and then be heard to affirm such disobedience in aid of a verdict that *might* have been rendered for the amount returned, they could also be heard to impeach the verdict as between the parties.

No authority is cited, nor do we find any, that will sustain the supporting affidavit of the juror. The amount claimed on account of the lost surgical operation is \$60.

The case will be remanded with directions to the lower

court to enter a judgment for the sum of \$525, provided a remission of all in excess of that sum is filed within thirty days after the remittitur goes down; otherwise a new trial will be granted. Appellant will recover costs in this court, and respondent will recover costs in the court below.

MOUNT, PARKER, and GOSE, JJ., concur.

[No. 11116. Department Two. July 12, 1913.]

FRANK PASAREL, *Respondent*, v. S. M. ANDERSON, *Appellant*.¹

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$1,200 for personal injuries is not excessive, where it appears that plaintiff was shot in the arm, the bullet, entering below and coming out at the elbow, disabling the plaintiff from following his occupation at \$3 a day for five months, and that he had not fully recovered at the time of the trial, seven months after the shooting, when he was earning but \$2.50 a day.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered November 9, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

Bridges & Bruener, for appellant.

Frank Beam, Governor Teats, Leo Teats, and Ralph Teats, for respondent.

FULLERTON, J.—In March, 1912, during a strike among the employees of the lumber mills on Grays Harbor, the respondent was shot in the arm by some one while at the mill of the Anderson & Middleton Lumber Company, which had been shut down as a result of the strike. The respondent charged the appellant with the shooting, and brought this action against him to recover in damages for the resulting injury. On the trial a verdict and judgment was entered

¹Reported in 133 Pac. 441.

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in his favor for the sum of \$1,200, and this appeal is prosecuted therefrom.

In this court the appellant makes but one contention, namely, that the verdict is excessive; arguing that it is so much so as to show that it was the result of passion and prejudice on the part of the jury. But the jury had the right to believe the evidence most favorable to the side of the respondent on the question of the effect of the injury. This evidence tended to show that the bullet entered the arm below the elbow, and extended upwards through the fleshy part of the arm for some two and one-half inches, coming out above the elbow; that while the wound did not become infected, and healed readily, it prevented the respondent from following his occupation for a period of nearly five months, and at the time of the trial, which was some seven months after the injury, had not then recovered its normal strength. His testimony also tended to show that he was earning three dollars per day prior to his injury, and that the best wage he was able to obtain since he recovered sufficiently to resume work was \$2.50 per day.

Conceding, as we must on the face of the record, that the appellant was liable for the injury, we cannot conclude that the verdict was excessive. The respondent's loss in wages alone was considerable, and when we consider the manner in which the injury was inflicted and the consequent mental suffering that would follow, it can hardly be said that the sum awarded was more than just compensation.

The judgment is affirmed.

MAIN, ELLIS, and MORRIS, JJ., concur.

[No. 10903. Department Two. July 12, 1913.]

GRAND COURT OF WASHINGTON, FORESTERS OF AMERICA *et al.*,
Respondents, v. CHARLES A. HODEL *et al.*,
Appellants.¹

BENEFICIAL ASSOCIATIONS—PROPERTY—SECESSION OF LODGE. The property and funds of a benevolent association which are required by the constitution and laws of the order to be held as a trust fund for specified purposes cannot, by a secession of a subordinate lodge receiving its charter from the general order, be diverted to other purposes without the unanimous consent of the members of the order.

Appeal from a judgment of the superior court for King county, Yakey, J., entered July 1, 1912, upon findings in favor of the plaintiffs. Affirmed.

J. D. Bauer, for appellants.

George H. Rummens and *J. Henry Denning*, for respondents.

FULLERTON, J.—The Foresters of America is a voluntary benevolent and social association, having courts or lodges throughout the United States. The highest court in authority is called the supreme court, which “is the source of all true and legitimate power and authority in the Foresters of America, wheresoever established.” Next in order are the grand courts, which possess certain defined powers granted them by the supreme court. Lastly come the subordinate courts, which receive their charters from the grand court. The order is governed by a written constitution and laws enacted thereunder, which provide minutely for the collection of the revenues of the order and the purposes for which they may be expended; section 110 of the general laws relating thereto reading as follows:

“All property and funds of a court and their increment, shall be held exclusively as a trust fund for carrying on

¹Reported in 133 Pac. 438.

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the fraternal and beneficial features of the order, and shall not be expended for any other than those purposes, and the payment of the necessary expenses of a subordinate court and the order. The funds may be invested from time to time, but such investment shall be made only in the stock of hall associations for the order, which associations shall be owned exclusively by the members of the order; bonds of the United States, state of Washington, building and loan societies under the control of the state building and loan commissioners, or deposited in savings banks, under the control of the state bank commissioners, or loaned on unincumbered real estate. Neither the whole nor any part of the court property or money shall ever be divided among the members, and no gift thereof shall ever be made, except from the benevolent fund, and in accordance with the laws of the order. Funds of the court shall never be loaned to any of its members. In case a court from any cause shall cease to exist, or be suspended, or dissolved, or have its charter or dispensation revoked, or be surrendered, all the funds and property of the courts of whatsoever kind shall immediately and *ipso facto* revert to the grand court of the state of Washington, and shall be immediately surrendered and delivered up to the grand court officers, or agents authorized to receive the same."

The order has a subordinate court at the city of Seattle, known as Court Enterprise No. 3, which is within the territorial jurisdiction of the grand court of Washington. On August 18, 1911, at a regular meeting of the subordinate court, a resolution was introduced to the effect that the local court secede from the order, and amalgamate with another fraternal order known as the Knights of the Golden West, which was then being organized. The court fixed the next regular meeting as the time for voting on the resolution, and directed that notice be sent to each member in good standing notifying him of the introduction of the resolution, and that a vote would be taken thereon at the next regular meeting of the court. The court then had a membership in good standing of 203; it owned property and lodge fixtures of some value, had cash on hand in the sum of \$387.67 and

owned local improvement bonds of the city of Seattle of the face value of \$1,260.07. At the meeting named in the notice, August 25, 1911, about seventy of the members attended. The meeting was opened in ritualistic form and proceeded with the formal order of business until the appropriate order for the resolution was reached, when a vote was taken on the same. All of the members present except some five or seven, voted in favor of the resolution, whereupon the same was declared carried, and the members present and voting in the affirmative withdrew from the order and carried with them the money and property of the court.

At the meeting at which the vote was taken, the grand chief ranger of the grand court of Washington was present, and when the vote was announced, that officer, acting in his official capacity, suspended from the order the members voting for the resolution, and declared all the offices of the court vacant. At a later date, on a regular meeting night of the court, this officer, acting pursuant to the laws of the order, issued a dispensation, permitting the members of the court then present to hold an election for the purpose of filling the vacated offices. A new election was thereupon held and installed, and the persons so elected have since performed the duties of officers of the subordinate court.

This action was instituted by the grand court of Washington, and Court Enterprise No. 3, and certain of their officers and members, against the individuals carrying away the court's property, for the recovery of the same. Judgment went in the plaintiffs' favor in the court below, and this appeal was taken therefrom.

The principal contention made by the appellants is that a subordinate lodge in an order, such as the one in consideration here, may secede from the parent organization, if the majority of such lodge wills it, and may take with them the money and property of the subordinate lodge. But such is not the rule. All of the properties which this branch of the order, as a fraternal and benevolent organization, had

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gathered together were trust funds in the sense that they were collected for particular uses. They were held in trust for the purposes designated by the constitution and laws of the order, and every member of the order has an interest in the fund to the extent of seeing that it is appropriated to the uses for which it was collected. No number of the members of the order less than the whole could, therefore, divert the funds to other uses than the uses defined in the constitution and laws of the order. The majority of any subordinate court can undoubtedly direct the use of the funds of the order for purposes of the order, and when there are two or more purposes for which the funds can be lawfully used, may select between them, but the majority cannot, against the will of the minority, lawfully divert such funds for uses other than those permitted by the constitution and laws of the order. This, as we understand the authorities, is the universal rule. *Smith v. Pedigo*, 145 Ind. 361, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433; *Mt. Zion Baptist Church v. Whitmore*, 83 Iowa 138, 49 N. W. 81, 13 L. R. A. 198; *Ferraria v. Vasconcellos*, 31 Ill. 25, 54; *Stebbins v. Jennings*, 27 Mass. 171, 181; *Nance v. Busby*, 91 Tenn. 303, 18 S. W. 874, 15 L. R. A. 801; *Grand Lodge, A. O. U. W. of Connecticut v. Grand Lodge, A. O. U. W. of Massachusetts*, 81 Conn. 189, 70 Atl. 617; *Knights of Pythias v. Germania Lodge No. 50*, 56 N. J. Eq. 63, 38 Atl. 341; *Schubert Lodge No. 118, K. P. of New Jersey v. Schubert Kranken Unterstutzen Verein*, 56 N. J. Eq. 78, 38 Atl. 347; *Watson v. Jones*, 13 Wall. 679; 2 Beach, Private Corporations, §§ 908, 910.

Sometime after the institution of Court Enterprise No. 3, an attempt was made to incorporate the court under the statutes relating to the incorporation of fraternal societies. It may be questioned, we think, whether the proceedings were sufficiently regular to accomplish the purposes intended. But were the facts otherwise, the rule with relation to its property would not be changed. Its funds would still be trust funds, subject to such disposition as the laws of the order

permitted to be made of them, and could not be diverted to a use contrary to such laws without the unanimous consent of the members of the order.

The judgment is affirmed.

MAIN, MORRIS, and ELLIS, JJ., concur.

[No. 11077. Department Two. July 14, 1913.]

OLIVER CHRISTIANSEN, *by his Guardian etc., Respondent* v.
F. McLELLAN, *Appellant*.¹

MASTER AND SERVANT—INJURY TO SERVANT—EXISTENCE OF RELATION. The relation of master and servant existed between the plaintiff and defendant, where the owner of a team hired the plaintiff to drive the team and then let the team, wagon, and driver to defendant in street grading work, the plaintiff being under the direction and control of the defendant.

SAME—SAFE PLACE TO WORK—CHANGING CONDITIONS—ASSUMPTION OF RISKS. An employee driving a team on a street fill does not assume the risks from the ever changing conditions, and the master owes the duty to furnish a safe place, where he was present and personally directed the work and plaintiff was injured while driving down an unsafe place at the specific direction of the master.

SAME—ASSUMPTION OF RISKS—QUESTION FOR JURY. Whether the driver of a team assumed the risk in obeying the specific order of the master to drive down a steep embankment is for the jury, unless the danger was so plain and apparent that there could be no two opinions concerning it.

EVIDENCE—OPINION EVIDENCE—EXPERTS. The opinions of experts are admissible as to whether it would be safe to drive a team and wagon loaded with earth down a steep embankment in street grading work, if the place was such as to require a person of special experience and knowledge to determine it.

EVIDENCE—RELEVANCY—REMOTENESS. In an action for personal injuries sustained in street grade work, evidence as to the grade of the slope at the time of the trial is admissible where by comparison it enabled the jury to determine the grade at the time of the accident.

¹Reported in 133 Pac. 434.

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Appeal from a judgment of the superior court for King county, Gilliam, J., entered October 23, 1912, upon the verdict of a jury rendered in favor of the plaintiff, for injuries sustained by an employee driving a team in street improvement work. Affirmed.

John W. Roberts and *George L. Spirk*, for appellant.

Arctander, Halls & Jacobsen, for respondent.

FULLERTON, J.—In the year 1911, the appellant, McLellan, had a contract with the city of Seattle to grade and otherwise improve parts of certain streets therein, included in which were parts of Battery and Elliott streets. Elliott street had been filled up to grade where it crossed Battery street, leaving an abrupt embankment of a considerable height between the surface of the streets. The improvement required the filling of Battery street at this point, and work was commenced thereon by hauling and dumping earth on the edge of the embankment on Elliott street and shoveling it from there into the street to be filled. After the fill reached a certain height, the foreman directed the teamsters hauling the dirt to drive over the embankment onto the fill and dump the loads as they passed down the same. The respondent was driving one such wagon, and on driving onto the dump with a load of earth, his wagon overturned, falling upon him and severely injuring him. He brought the present action to recover for the injuries suffered. At the trial, the jury returned a verdict in his favor for \$1,500. From the judgment entered thereon this appeal is taken.

The appellant first contends that the relation of master and servant did not exist between himself and the respondent, and hence the respondent cannot predicate a right of recovery against him on the liabilities growing out of that relation. The contention that the respondent was not the appellant's servant is founded on the fact that the team and wagon was owned by one Rennie, who hired the respondent to drive the same and then let the team, wagon and driver

to the appellant at a given consideration per day. But the respondent was the servant of the person under whose direction and control he was at the time he was injured. As was said in *Coughlan v. Cambridge*, 166 Mass. 268, 44 N. E. 218:

“It is well settled that one who is the general servant of another may be lent or hired by his master to another for some special service, so as to become as to that service the servant of such third party. The test is whether, in the particular service which he engaged to perform, he continues liable to the direction and control of his master or becomes subject to that of the party to whom he is let or hired.”

And this court, in *Wiest v. Coal Creek R. Co.*, 42 Wash. 176, 84 Pac. 725, speaking through Judge Dunbar, said:

“But the law is well established that when one person lends his servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him.”

There is evidence in the record from which the jury could find that the respondent while engaged in hauling the earth was under the direction and control of the appellant. Since, therefore, the court submitted the question to the jury, under instructions to which no complaint was made, their finding is conclusive upon the question.

It is next contended that the rule requiring the master to provide his servant with a safe place in which to work has no application to the facts shown in this record, for the reason that the place of work was constantly changing with reference to its safety, and the servant under the circumstances must be held to have assumed the risks. But the record shows that the master was present on the ground directing the work of the drivers of the teams, of which there were some twelve or more, telling them where to drive and where to drop their loads. Since the master assumed this function, he was bound to take notice of the change in con-

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ditions himself and not direct the teams into situations where more than the ordinary dangers were likely to be encountered. The respondent drove down the embankment in the presence of and on the specific order of the appellant, and the appellant cannot escape liability for the injury suffered on the principle that the conditions of the working place did not remain stationary.

The third contention is that the respondent assumed the risk of injury from driving down the embankment, but we think this was a question for the jury. True, the slope was steep, and was obvious to the respondent, but the order of the master directing him to drive thereover contained the implied assurance that it was a reasonably safe thing to do, and the mistake in judgment is the mistake of the master, unless the danger was so plain and apparent that there could be no two opinions concerning it, and whether or not it was so was for the jury. *Amustasakas v. International Contract Co.*, 57 Wash. 453, 107 Pac. 342; *Johnson v. Collier*, 54 Wash. 478, 103 Pac. 818; *Hilgar v. Walla Walla*, 50 Wash. 470, 97 Pac. 498, 19 L. R. A. (N. S.) 367; *Parr v. Spokane*, 67 Wash. 164, 121 Pac. 453; *Fueston v. Langan*, 67 Wash. 212, 121 Pac. 55; *Knudsen v. Moe Brothers*, 66 Wash. 118, 119 Pac. 27.

Further contentions on this branch of the case are made to the effect that the injury to the respondent was caused by a defect in the wagon which he was driving, that the place over which he was directed to drive was reasonably safe, and that the respondent was guilty of contributory negligence because of the manner in which he handled the team and wagon. But on each of these questions the evidence was conflicting, and the court submitted them to the jury. This concludes the inquiry in this court.

The court in the course of the evidence allowed certain expert witnesses to give their opinion as to whether or not the grade over which the respondent was directed to drive

was reasonably safe for that purpose. The appellant objected to the evidence when offered by the respondent, although he afterwards availed himself of the court's ruling and introduced evidence on his own behalf of the same character. In this court it is complained that the court erred in admitting such evidence, but we think the complaint unfounded. The line of demarkation between matters that fall within the common knowledge of mankind and matters that are the subject of special and peculiar knowledge cannot from the nature of things be accurately drawn; the one of necessity shades into the other, and even though the extremes of the opposing rules be definitely marked and error predicated thereon easy of determination, the trial court must have something of discretion whether he will or will not admit opinion where the line is approached. There are places, of course, over which a person of common understanding would know whether or not it was reasonably safe to drive a wagon loaded with earth, but there must be many such which would take a person of special experience and knowledge to say whether the act would be safe or unsafe. The case at bar seems to us to be such a case, and we think no reversible error was committed in admitting the testimony.

A witness, an engineer, was permitted to testify to the grade of the slope as it existed at a period before the trial but subsequent to the time the respondent was injured and when it was concededly not in the same condition it was at the time of the injury. This is thought to be error, but the evidence by comparison with other known data enabled the jury in some degree to determine the grade of the slope at the time of the injury. This rendered it admissible.

Finally, the appellant complains of the excessiveness of the verdict, but we see no reason to interfere with the conclusion of the jury in that regard.

The judgment is affirmed.

MAIN, ELLIS, and MORRIS, JJ., concur.

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Opinion Per GOSE, J.

[No. 11019. Department One. July 14, 1913.]

JOHN MARSHALL MAGGS *et al.*, Respondents, v. THE CITY OF SEATTLE *et al.*, Appellants.¹

DEDICATION—PAROL DEDICATION—EVIDENCE—SUFFICIENCY. A parol dedication is not sufficiently established by evidence of alleged statements made by the owner some twenty years before the trial, to the effect that the strip "was an old county road," that he had "taken twenty feet here for a street" or "laid out twenty feet for a driveway," and the plat showed it to be part of a lot with no expressed intention to dedicate.

HIGHWAYS—PRESCRIPTION—EVIDENCE—SUFFICIENCY. A highway by prescription is not established by use of a wagon road, convenience way, or trail, confined to a few people, and used by sufferance of the owners.

MUNICIPAL CORPORATIONS — STREETS — IMPROVEMENTS — REVIEW BY COURTS. The method of improving streets by lawful structures being a political question, the courts cannot interfere to direct the authorities as to the kinds of gutters and curbs to place at a certain corner.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 29, 1912, in favor of the plaintiffs, in an action for an injunction, after a trial before the court. Modified.

James E. Bradford and *William B. Allison*, for appellants.

John E. Ryan and *Grover E. Desmond*, for respondents.

GOSE, J.—The principal question presented by this appeal is whether the north twenty feet of lot 5, block 7, supplemental plat of Union Lake addition to the city of Seattle, is a public highway. The city asserts that it is a part of a public highway established (a) by the board of county commissioners in 1879, (b) by parol dedication, and (c) by prescription.

The city makes little contention as to the first proposition, and it finds no substantial support in the record.

¹Reported in 133 Pac. 388.

The second contention is equally wanting in merit. It is based on alleged statements made by the owner (now deceased) some twenty years before the trial. One witness said that the owner stated in his presence that "it was an old county road"; another witness, that he said, "I have taken twenty feet here for a street," indicating the strip in controversy. The third witness said that the statement was that "he laid out twenty feet for a driveway." The plat shows it to be a part of a lot, and the owner expressed no intention to dedicate, to any member of his family.

Union Lake addition was platted in 1883. The supplemental plat was filed in 1888. In 1879 a road was laid out extending from the city proper along the easterly slope of Queen Anne hill to what was then Fremont. In 1889 or 1890, Westlake avenue was opened for travel. In 1890 Dexter avenue was graded. Thereafter these streets were the principal thoroughfares between Seattle and Fremont, and other points to the north. Block 7, in which this lot is situated, is on the easterly side of Queen Anne hill, and is bounded on the east by Dexter avenue, a street running north and south, and on the south by Garfield street, which runs east and west. Block 8, which lies immediately west of this block, touches Seventh avenue north on the west. There is an alley between blocks 7 and 8, extending from Garfield street on the south to an unplatted tract on the north. The court found that the strip of land in controversy was not a public highway by prescription or otherwise. The view of the trial court may best be had by a reference to his opinion. He said:

"The satisfactory testimony to my mind shows that this strip of twenty feet was not within the limits of the old road as originally laid out. . . . It is well known to everybody who has lived in Seattle a long time that the land which was in the city, unplatted, and even a great deal of it after it was platted, was crossed by people living in the vicinity where it was convenient for them to go, and by license of the owner. A great deal of land has been platted after these old roads

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were used, and if the city were to undertake to claim and establish as a highway all of these trails and roads that had been used, the whole plat of the city of Seattle would be out of harmony. It would be a confiscation of private property without any advantage, because the use subserved originally by those old roads has now been supplied by the streets and alleys that have been laid out over the platted property. . . . It would be impossible for the court, under the testimony, to locate exactly where this road did run with reference to this lot 5, if it ran over lot 5 at all. I am inclined to think it did touch lot 5, or a part of it, but where, it would be impossible to say under this evidence, and in my opinion this road is not an old county road, but one of those licensed roads that the people around there followed without any objection. . . .”

This view is abundantly supported by the evidence. The record shows numerous roads and temporarily traveled ways running promiscuously through blocks 7 and 8. Some of the city's witnesses said that there was a “plain wagon road” along the north twenty feet of lot 5. Others said it was “a well-defined road.” Some of the defendant's witnesses said “I would call it a trail.” Others referred to it as a “dog trail.” The foreman in charge of the work for the contractors who regraded Dexter avenue testified that at that time (1911) “there had been a road there apparently,” “just room for a wagon”; that it had not been traveled to any extent, and that “it looked like a trail.” The writer is convinced from a reading of the entire record that this road, wherever it ran, was little used after the opening of Westlake avenue in 1889 or 1890, and the opening of Dexter avenue in 1890. Its use was confined to a few people living in blocks 7 and 8. It was a mere convenience road, used by the sufferance of the owners of the legal title. Nor can we say that there is a preponderance of evidence to the effect that it ran along the north twenty feet of lot 5 at any time. As the trial court observed, it may have touched the northeast corner of lot 5. It is needless, however, to pursue the question further. The evidence is in hopeless conflict as to where the road ran in lot 5, if it touched it at all. We are convinced

that no right was gained by prescription. The observation of the trial court that these trails and convenience ways were used by the people of Seattle by the sufferance of the owners on platted and unplatted tracts, while unoccupied, is in harmony with the practice in other communities in the state. Many such roads may be seen on unoccupied platted tracts in other towns, and yet it would not occur to any one that these trails or ways of convenience were intended as streets or alleys. In 1879, when the Fremont road was laid out, Queen Anne hill was a wilderness, and Fremont was a logging camp. The hill was logged off between that date and 1890. During that period the people in that vicinity followed the lines of least resistance when traveling. After 1890 practically all the travel in that locality was upon Dexter and Westlake avenues.

Before the commencement of the action the city had provided a crossing and rounded the curb in front of the property in controversy. The decree directs that these be removed. The method of improving streets where the structure is not unlawful is a political question, with which the court may not interfere. Rem. & Bal. Code, § 7507 (P. C. 77 § 83); *Spokane Street R. Co. v. Spokane*, 5 Wash. 634, 32 Pac. 456. The decree will be modified to this extent. The cause will be remanded with instructions to eliminate from the decree the following:

“The city of Seattle and its board of public works are hereby ordered and directed to remove the curbs placed in the gutter in front of the north twenty feet of the above described property, and to place therein a continuous gutter within sixty days from the date hereof.”

Neither party shall recover costs in this court.

CHADWICK, MOUNT, and PARKER, JJ., concur.

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Opinion Per PARKER, J.

[No. 11084. Department One. July 14, 1913.]

JOHN H. SHEETS, *Appellant*, v. COAST COAL COMPANY *et al.*,
Respondents.¹

BILLS AND NOTES—BILL OF EXCHANGE—ACCEPTANCE—ORDERS—STATUTES—CONSTRUCTION. An order by an employee in a mine authorizing the employer to deduct one dollar per month from the monthly wage to pay for the services of Dr. S., as mine physician, is a bill of exchange, upon which there is no liability until accepted in writing, under Rem. & Bal. Code, § 3516, providing that a bill of exchange is an unconditional signed order requiring the drawer to pay money to order or bearer, and Id. §§ 3517 and 3522, providing that the drawee is not liable unless he accepts the same in writing.

MASTER AND SERVANT—MEDICAL ATTENDANCE—PHYSICIANS AND SURGEONS—EMPLOYMENT. A physician who obtained a number of orders from employees of a mining company, authorizing the company to deduct one dollar a month from their wages to pay a mine physician, who failed to recover on the orders because they were not accepted as required by law, cannot question the validity of an election, fairly conducted, by which a majority of all the employees chose another physician for the position and contracted with him for medical attendance upon all employees contributing thereto.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered June 28, 1912, upon findings in favor of the defendants, in an action on contract. Affirmed.

Walter M. Harvey, for appellant.

Williamson, Williamson & Freeman, for respondent Coast Coal Company.

Ray & Dennis, for respondent United Mine Workers of America.

PARKER, J.—The plaintiff, a practicing physician, seeks recovery from the Coast Coal Company, a coal mining corporation, upon a number of orders signed by its employees for the payment of portions of their wages, in form as follows:

¹Reported in 133 Pac. 433.

“Spiketon, Wash.....1911.

“Coast Coal Co.: You are hereby authorized to deduct One Dollar per month from my monthly pay, to pay for the services of Dr. Sheets as mine doctor. Signed.....”

These orders the plaintiff claims the coal company accepted and agreed to pay. The coal company answered, denying that it accepted or agreed to pay the orders, and further pleaded, in substance, that it had collected by common consent from each of its employees \$1 per month by deducting the same from their wages for the purpose of paying a mine physician; that the fund so collected is claimed by the hospital board of Local No. 2869, Mine Workers of America, a union of which nearly all of the coal company's employees are members, for the purpose of paying the same to Dr. William H. Douglas, whom the union claims to be the duly chosen mine physician by the employees and to whom the sums are payable; that it has the amount so collected in its possession, and being unable to determine to whom it is legally payable, prays for an order requiring the union to appear in the action and set forth its claims thereto, and that the court render judgment designating the party to whom the fund shall be paid. Thereupon, the union intervened in the action, set forth its claim to the fund as the employer of Dr. William H. Douglas as the mine physician, claiming authority to so employ Dr. Douglas by virtue of an agreement with the coal company and by virtue of an election of Dr. Douglas as such physician by vote of the employees of the company, including the employees not members of the union as well as the employees who are such members. A trial before the court resulted in a finding and judgment in favor of the coal company and the union, from which the plaintiff has appealed.

Counsel for appellant seems to rest his claim against the coal company entirely upon the giving of the orders, a copy of which we have quoted, and the claimed acceptance thereof by the coal company. Considerable evidence was introduced

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bearing upon the question of the acceptance of these orders by the coal company. We would be inclined to regard this evidence as insufficient to establish the fact of acceptance by the coal company even if oral acceptance by the coal company would, under our law, render it liable for the payment of such orders. However that may be, it seems plain to us that these orders are, in substance, bills of exchange as defined by Rem. & Bal. Code, § 3516 (P. C. 357 § 251), as follows:

“A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.”

The manner in which the drawee may bind himself to pay such an order is limited by the provisions of Rem. & Bal. Code, §§ 3517, 3522 (P. C. 357 §§ 253, 263), as follows:

“A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.”

“The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee.”

These provisions of our statutes have been noticed and given effect by this court in the following cases: *Nelson v. Nelson Bennett Co.*, 31 Wash. 116, 71 Pac. 749; *Wadhams v. Portland, Vancouver & Yakima R. Co.*, 37 Wash. 86, 79 Pac. 597; *Frederick & Nelson v. Spokane Grain Co.*, 47 Wash. 85, 91 Pac. 570. No evidence whatever of an acceptance of these orders in writing by the coal company was introduced. It follows that appellant cannot recover from the coal company upon the theory of his complaint.

We are unable to understand from the record that appellant is claiming recovery upon any other theory than that of the giving and acceptance of these orders; but if we as-

sume that he is entitled to be heard upon the question as to whether he or Dr. Douglas is the duly chosen physician of the employees, we are met with the fact that, at an election held for that purpose, which manifestly was fairly conducted, and where all of the employees were entitled to vote, whether members of the union or not, and where nearly all of them did vote, Dr. Douglas received a clear majority of such votes over appellant; in pursuance of which election the contract was entered into between the union and Dr. Douglas for a period of one year, which entitled all of the employees, whether union members or not, to his services. Some considerable argument is indulged in touching the authority of the union to enter into this contract with Dr. Douglas. We think, however, there is sufficient evidence in the record, especially as against the claims of appellant, to warrant the conclusion that Dr. Douglas was employed by the union at the instance of the coal company and thereby became the duly chosen mine physician for the benefit of all of the employees. The orders upon which appellant rests his claim were obtained from a number of the employees during a period of about a month following the election. We think that appellant, having failed to make sufficient showing entitling him to recover upon the theory of his complaint, has no standing to question the binding force of the choosing of Dr. Douglas by the election as the mine physician. There is no question but that the \$1 per month was retained from the wages of each of the employees, for the purpose of paying a mine physician, by consent of all the employees and in pursuance of the custom obtaining there, and the physician having been fairly chosen and contracted with for the service to be rendered, appellant cannot defeat the validity of such choosing by the method he invokes. It is plain that the coal company did not collect any of the funds by authority of these orders, but by common consent of all of the employees, who so paid \$1 each, monthly, and in pursuance of the prevailing custom. No employee was obliged to pay; in fact, some did not do so; but

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as to all who did so voluntarily pay, appellant is in no position to challenge the method adopted by the coal company and the union for choosing a physician.

The judgment is affirmed.

GOSE, MOUNT, and CHADWICK, JJ., concur.

[No. 11080. Department Two. July 15, 1913.]

FRED HOWARD, *Respondent*, v. BUSSELL LAND COMPANY,
Appellant.¹

APPEAL—REVIEW—STATEMENT OF FACTS—DISMISSAL. A statement of facts, filed after time without any extension granted, will be struck out, and the appeal dismissed where no question is raised outside the statement.

Motion to strike the statement of facts on appeal from a judgment of the superior court for Yakima county, Grady, J., entered October 21, 1912. Appeal dismissed.

H. J. Snively, for appellant.

McAulay & Meigs, for respondent.

MORRIS, J.—Upon the hearing of this appeal, a motion was made to strike the statement of facts upon the ground that the same was not filed nor served within thirty days from the entry of the judgment, and no extension of time had been granted. Judgment was entered October 21, 1912, and the proposed statement of facts was filed and served November 21, 1912. No extension having been granted, this was too late. Rem. & Bal. Code, § 393 (P. C. 81 § 693), provides that a proposed statement of facts must be filed and served before or within thirty days after the time begins to run within which an appeal can be taken, unless such time be enlarged by an order of the court. It will be noted that this proposed statement was served and filed on the thirty-first day. If we ex-

¹Reported in 133 Pac. 596.

tend the time fixed by the statute one day, we could extend it a hundred days and thus work a repeal of the statute. No question is raised in this case outside of the statement of facts. To strike, therefore, works a dismissal of the appeal. The appeal is dismissed and the judgment of the lower court affirmed.

MAIN, ELLIS, and FULLERTON, JJ., concur.

[No. 11051. Department One. July 15, 1913.]

E. W. WAY, *Appellant*, v. PACIFIC LUMBER AND TIMBER COMPANY, *Respondent*.¹

INSURANCE—REBATING — CONTRACTS—VALIDITY—STATUTES—VIOLATION—EFFECT ON CONTRACT. A contract for insurance at a reduced rate, in violation of § 33 of the insurance code (Laws 1911, p. 195) prescribing penalties for so doing, is not void, in the absence of any provision in the statute so declaring; hence there is no implied contract on the part of the insured to pay the balance of the lawful premium.

Appeal from a judgment of the superior court for King county, Myers, J., entered October 28, 1912, upon the verdict of a jury rendered in favor of the defendant, in an action on implied contract. Affirmed.

Marion A. Butler and *R. H. Lindsay*, for appellant.

Douglas, Lane & Douglas, for respondent.

CHADWICK, J.—Plaintiff and H. M. Gould were copartners, doing an insurance business in the city of Seattle. Certain policies of insurance were written by the firm in favor of the defendant Pacific Lumber and Timber Company, a corporation, at a rate less than what may be called the “board” or “compact” rate. The policies were paid for at the reduced rate. Some time subsequent to the time of the issuance of the policies, the copartnership was dissolved, Gould retiring, and

¹Reported in 133 Pac. 595.

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plaintiff has brought this action to recover the difference between the board rate, or what he insists the rate should have been, and the amount paid. The court found that Way had no knowledge of the transactions leading up to the issuance of the policies, but that the partnership was nevertheless bound by the act of Gould, and that he could not recover.

It is the theory of the plaintiff, that the contract made by Gould for the firm was illegal and void under the insurance code, Laws 1911, ch. 49, p. 195, § 33 of which makes the selling of insurance at less than the scheduled rate unlawful; that the unlawful agreement of one partner without the knowledge or consent of the other is not binding upon the firm, and that he, as the successor of the firm and as assignee of Gould's interest therein, is entitled to recover.

We are invited by defendant to discuss the constitutionality of the act of 1911 in so far as it gives to insurance companies and other outside agencies the right to fix rates that are binding upon the state and its citizens, but we think it unnecessary to go into this phase of the case; for, as we view it, plaintiff cannot recover upon general grounds. The contract was made and executed. Plaintiff can only recover upon a contract, express or implied. That he cannot recover upon an express contract goes without saying, for the amount agreed to be paid for the policies has been paid. There is no implied contract unless it is in virtue of § 33 of the insurance code. This section is designed to prevent rebating. It penalizes a company, agent, solicitor, or broker by revoking its or his license, and the property owner by reducing the insurance in such proportion as the amount of the rebate bears to the total premium, and by making him liable to pay a fine "of not more than two hundred dollars."

Plaintiff's error lies in the assumption that the contract between the copartnership and the defendant was void, whereas the rule is that a contract which violates a statutory regulation of business is not void unless made so by the terms of the act.

"It is a general proposition, sustained by the weight of authority, that where a statute imposes a penalty for failure to comply with statutory requirements, the penalty so fixed is exclusive of any other." *La France Fire Engine Co. v. Mt. Vernon*, 9 Wash. 142, 37 Pac. 287, 38 Pac. 80, 43 Am. St. 827.

See, also, *Horrell v. California, Oregon & Washington Home-builders' Ass'n*, 40 Wash. 531, 82 Pac. 889. The statute strikes no blow at the business of insurance, neither does it assume to void contracts. Its purpose is to regulate, not to prohibit.

"When a statute is . . . a regulation of a traffic or business, and not to prohibit it altogether, whether a contract which violates the statute shall be treated as wholly void will depend on the intention expressed in the particular statute. Unless the contrary intention is manifest the contract will be valid." Sutherland, *Statutory Construction*, § 336.

The distinction between a valid contract but one subjecting the contracting parties to penalties and one made in contravention of a positive statute, or one declaring a public policy, will be illustrated by comparing the cases we have just cited with the case of *Carstens Packing Co. v. Southern Pac. R. Co.*, 58 Wash. 239, 108 Pac. 613, 27 L. R. A. (N. S.) 975.

It follows, there being no contract or promise made by the defendant to pay a greater sum than has been paid, and none implied by statute, that the judgment should be affirmed.

GOSE, PARKER, and MOUNT, JJ., concur.

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Opinion Per Gose, J.

[No. 11288. Department One. July 15, 1913.]

P. L. Toon, *Respondent*, v. W. O. McCaw *et al.*, *Appellants*.¹

CORPORATIONS—REPRESENTATION—BILLS AND NOTES—EXECUTION—REPRESENTATIVE CAPACITY OF MAKERS—PAROL EVIDENCE. The officers of a corporation who sign a note reading that "We" promise to pay, without stating in the note or signatures the manner or capacity in which they act, are jointly personally liable and cannot be heard to say that they signed only as officers of the corporation, which received the consideration, where there is no ambiguity in the language of the note itself.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered December 2, 1912, in favor of the plaintiff, upon sustaining a demurrer to the answer, in an action upon a promissory note. Affirmed.

Frank Beam, for appellants.

Dan Pearsall and *T. H. McKay*, for respondent.

Gose, J.—The plaintiff brought suit upon the following note:

"\$500.

June 20, 1910.

"One year after date, without grace, we promise to pay to the order of P. L. Toon Five Hundred and no-100 Dollars in gold coin of the United States of America, of the present standard value, with interest thereon, in like gold coin, at the rate of ten per cent. per annum from date until paid, for value received. Interest to be paid at end of year and if not so paid, the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, we promise and agree to pay, in addition to the costs and disbursements provided by statute. Dollars in like gold coin for attorney's fees in said suit or action.

Due June 20, 1911.

At Aberdeen, Wash.

No. 4

Aberdeen Tug Boat Co.,

Thos. Willikson,

Cash Manley,

"Sven Johnson."

¹Reported in 133 Pac. 469.

It is alleged in the complaint that the defendant, Aberdeen Tug Boat Company, at the time of the execution of the note, was and is a corporation; that the defendant McCaw had been regularly appointed receiver for its property; that he had qualified and was acting as such receiver; that the defendants made and delivered the note on the day it bears date; and that it had not been paid. The defendants Willikson, Manley and Johnson answered jointly, and alleged affirmatively that the note was drawn on the day it bears date by the bookkeeper for the defendant corporation at the request of its officers; that it was then presented to such officers for their signatures; that the defendant Willikson signed the note as president of the corporation; that the defendant Manley signed it as vice president, and Johnson signed it as secretary of the corporation; that the three named defendants directed the bookkeeper not to deliver the note until he had written the title of each of such officers after his name; that he was directed to write after each of said names the respective official titles of the answering defendants; that the consideration for the note passed to the defendant corporation, and was used by it in paying some of its outstanding indebtedness; that no consideration whatsoever passed to said defendants individually; "that said note was understood by all of the parties thereto, to be the note of said corporation; and the money was loaned on the credit of said corporation; that said defendants refused to indorse or sign said note in their individual capacity."

A general demurrer interposed to this defense was sustained. The defendants declined to plead further, and on motion of the plaintiff, judgment was entered in his favor against all the defendants. The defendants Willikson, Manley and Johnson prosecuted this appeal.

The appellants thus state their contention:

"In the case at bar the signature to the note is certainly ambiguous. The signature might be interpreted to be that

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of the corporation alone, of the individuals alone, or of both the corporation and the individuals signing."

We cannot acquiesce in this view. Ambiguity cannot be created by pleading it. It must appear in the instrument itself. It will be observed that the defendants jointly promised to pay the note. There is nothing upon the face of the note to indicate that it was a note of the corporation only, or that it was other than the joint obligation of all of the makers. The language of the note is "we promise to pay." This language is repeated in reference to the attorney's fee. Counsel for the appellants have quoted rather extensively from Thompson on Corporations (2d ed.), but as we read the references, the views of the author afford them little comfort. In vol. 2, page 986, the author says:

"The general rule is, that where an officer or agent executes a negotiable instrument in behalf of the corporation, but neither in the body of the note nor in his signature is the manner or capacity in which he acts shown, then he is personally liable."

Any other rule would destroy the stability of written contracts. There is no language in the note which raises even a slight ambiguity or creates any doubt as to the meaning of the instrument, or that remotely suggests that the makers were acting for another. The same author, at page 982, says:

"As between the original parties, and where there is something on the face of the instrument that suggests a doubt as to what particular party is bound, and the court cannot by inspection determine the question from the paper itself, parol evidence is admissible to show the true intent and meaning of the persons executing the instrument."

Counsel further suggests that the corporation, being an artificial creature, could not have written its own name. This question is not before us. The corporation itself is not litigating the question of its liability. What defenses it might have successfully interposed is collateral to the inquiry.

This court has frequently announced principles directly antagonistic to the contention of the appellants. In *Bradley Engineering & Mfg. Co. v. Heyburn*, 56 Wash. 628, 106 Pac. 170, 134 Am. St. 1127, we held that, under the negotiable instruments law, even between the original parties, one who signed a note as a general maker could not prove by parol that he was a surety, that he received none of the benefits of the transaction, that the payee knew that fact, and that he was discharged in consequence of an extension in the time of payment without his knowledge or consent. In *Shuey v. Adair*, 18 Wash. 188, 51 Pac. 388, 63 Am. St. 879, 39 L. R. A. 473, it was held in an opinion written by the late Chief Justice Dunbar, after an exhaustive review of the cases, that one who executes a promissory note in his own name with nothing upon the face of the note showing his agency, could not introduce parol evidence to show that he executed it for his principal, that the payee knew it, and hence that he incurred no liability. In *Anderson v. Mitchell*, 51 Wash. 265, 98 Pac. 751, we held that the maker of a note, the note being free from ambiguity, could not show by parol that he executed the note for a corporation which desired the loan, and to which the bank could not make the loan because the amount of the loan, together with the debt then owed by the corporation to the payee, a national bank, would be in excess of the amount permitted by the Federal banking laws, and that he made the note at the request of the payee upon the distinct agreement that he should not be liable thereon, either as principal or surety. In that case the respondent became the holder of the note after its maturity. In *Daniel v. Glidden*, 38 Wash. 556, 80 Pac. 811, where the note was signed "H. M. Glidden, Secy.," it was held that Glidden could not exonerate himself from liability by parol proof that he executed the note as secretary of a corporation to which the plaintiff loaned the money. In that case the court said:

"There are no apt words used in the note showing that the corporation is obligated. Therefore, although appel-

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lant's signature is followed by an abbreviated word indicating a representative capacity, yet no obligated principal being disclosed, he cannot escape personal liability under our negotiable instrument law."

These principles have abundant support in the cases from other jurisdictions. In *San Bernardino Nat. Bank v. Anderson* (Cal.), 32 Pac. 168, the note was signed "John Andreson, President, J. A. Crawford, Secretary." The note was otherwise unambiguous. It was held that the defendants could not show by parol that they were respectively the president and secretary of the San Bernardino Fruit Company, a corporation, that the money was loaned to the corporation, and that the note was intended as and for the debt of the corporation and not as the individual note of the defendants. The following authorities are to the same effect: *Keokuk Falls Imp. Co. v. Kingsland & Douglas Mfg. Co.*, 5 Okl. 32, 47 Pac. 484; *Matthews v. DuBuque Mattress Co.*, 87 Iowa 246, 54 N. W. 225, 19 L. R. A. 676; and *Davis v. England*, 141 Mass. 587, 6 N. E. 731.

As we have said, any other rule would destroy the stability of written instruments. The note imports a joint obligation of the appellants, and they have sought to plead and prove that, while they apparently executed the note in their individual capacity, they intended in fact to execute it as the note of the defendant corporation only. This would be to create an ambiguity where none exists and to make for the parties a contract which they did not make for themselves.

Judgment is affirmed.

CHADWICK, MOUNT, and PARKER, JJ., concur.

[No. 11007. Department One. July 15, 1913.]

ORR COMPANY, *Respondent*, v. INTERLAKEN LAND COMPANY,
Appellant.¹

BROKERS—COMMISSIONS — CONTRACTS — PERFORMANCE—"SALE." A broker, having a contract for the exclusive sale of a large tract of residence property on commission, did not make a sale entitling him to commissions, where, in the hope of inducing sales of the balance of the property, he procured a building company to enter into a contract to draw plans for and put up ten residences under a co-operative plan, work on which was to proceed only on the sale of each successive lot to third parties, and no present title passed, the owner merely agreeing to pass title to the building company in order to secure a loan for fifty per cent of the cost of the buildings, give a second mortgage, and make sales to third parties, no such sales being made by the broker and the second contract not providing for the payment of commissions; since the execution of the second contract *ipso facto* withdrew the property specified from the operation of the first contract, without effecting any sale thereof.

SAME—CONTRACTS—FRAUDS, STATUTE OF. Under Rem. & Bal. Code, § 5289, providing that a contract for a broker's commission on the sale of real estate must be in writing, a broker is not entitled to commissions unless the writing determines the amount of the agreed upon commissions without resort to parol testimony.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 21, 1912, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Reversed.

J. Y. C. Kellogg, for appellant.

Charles P. Harris, for respondent.

Gose, J.—This is a suit to recover a broker's commission upon an alleged sale of real estate. The case was tried to the court. There was a judgment for the plaintiff. The defendant has appealed.

Respondent's claim has its basis in two written contracts. The first contract was made on the 16th day of November,

¹Reported in 133 Pac. 599.

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1909, between the appellant as the party of the first part, and the respondent as the party of the second part. The appellant then owned an addition of high class residence property which it desired to convert into cash to the extent of about \$480,000 as soon as possible. This contract provides that the appellant constitutes and appoints the respondent "its sole agent for the sale" of all unsold lots in Interlaken, an addition to the city of Seattle; that the agency shall continue in force for one year from the date of the contract; that the terms on which all lots shall be sold are "one-third cash, the balance in four equal semi-annual payments," with interest on all deferred payments as specified; "provided, however, that a reduction of two and one-half per cent shall be allowed for all sales for cash, and provided further, that any purchaser desiring to build immediately on the lot or lots purchased" may purchase on the basis of one-fourth cash, the balance in four equal semi-annual installments, with interest on deferred payments as stipulated; and that when the sale is for cash, and the purchaser desires to build immediately on the lot purchased, there shall be a discount of four per cent of the purchase price, in addition to the two and one-half per cent discount above specified; that the respondent "shall be entitled to receive twenty per cent commission on the actual purchase price of any property sold . . . to be paid it on the execution and delivery of the purchase deed when the sale is for cash, otherwise one-half of said compensation or commission to be paid to the party of the second part upon the execution and delivery of the contract for sale and that the other half of said compensation to be paid to the party of the second part upon the collection of the first deferred payment." The contract further provides that if the total sales made by the respondent should not reach seventy-five thousand dollars by May 16, 1910, or \$150,000 by August 16, 1910, that the appellant might at its option terminate the contract by giving the stipulated notice.

On the 6th day of December following, the respondent in-

duced the appellant to enter into a contract with the W. M. Lucas Building Company, a corporation, which provides that the latter company should prepare plans, elevations, and specifications for a dwelling house for each of ten enumerated lots in Interlaken, subject to approval by a representative of the appellant; that the dwelling houses should cost the sums respectively enumerated in the contract, ranging from \$3,500 to \$5,000; that the specifications for the first house to be constructed should be submitted for approval within fifteen days after date of the contract; plans for the second house within thirty days; plans for the third house to be submitted within forty-five days; and that thereafter it should submit plans for a house every twenty days until the plans, elevations, and specifications should have been submitted for the ten houses to be constructed under the contract. The contract further provides, that within ten days after any approval of the plans, elevations and specifications for a house on any lot, the building company is to commence the work of excavating for such house, and have the same under roof and plastered within ninety days after such approval, and completed and ready for occupancy within one hundred and eighty days after such approval; "provided, that after the commencement of work on the third house the party of the second part (the building company) shall not be required to commence work on any further house until a sale of one of said lots shall have been made; and after each such sale, the party of the second part shall, within five days, commence work on another house and lot; it being hereby understood and agreed that no house shall be commenced after ten months from the date of this contract."

It was further stipulated "that whenever any house erected on any of said lots has been fully roofed and plastered, the party of the first part (the appellant) upon payment to it by the party of the second part of the sum of one hundred dollars, will sell and convey such lot to the party of the second part by a good and sufficient deed of general war-

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ranty, free and clear of all incumbrances of whatsoever nature except the lien of paving assessments, and any assessments which may become a lien after the date of this contract, for the purpose of enabling the said party of the second part to obtain a building loan on said property due in not less than three nor more than five years, said loan not to exceed fifty per cent of the value of the property, and to bear interest at the rate of seven per cent per annum, and for the further purpose of enabling party of the second part to make a contract of sale of said premises to some third party"; that "the prices and terms on which such sales by the party of the first part shall be are" as therein specifically enumerated. It was further agreed that each deferred payment should be evidenced and secured by a promissory note, and second mortgage upon the lot, and residence erected thereon; that if the building company was not in default as to any of its covenants, the appellant would cancel the note and mortgage made by the building company to it on any lot "upon notice of sale and conveyance of said lot by the party of the second part to some third party, and upon presentation to the said party of the first part of a new note and mortgage made by said third party in favor of the party of the first part for the balance of the principal and interest due on said lot, payable according to the terms of such new note and mortgage, in four equal semi-annual payments" with interest as stipulated, such mortgage to be a lien on the lot paramount to all other liens and incumbrances, except the building loan mortgage; and that, if the total amount of the deferred payments should be less than the unpaid purchase price of the lot, the difference should be paid in cash by the building company to the appellant.

The contract further provides that the mortgage and notes executed by third parties should be in favor of the appellant, to the extent of the principal and interest due it under the second mortgage executed to it by the building company. It was further agreed that the appellant should

have the right to terminate the agreement at its election, giving written notice in the manner stipulated in the contract; that "as to each of said lots," if the building company had not made a sale thereof within nine months after the date of the sale of the lot to it by the appellant, then the appellant might at its option at any time thereafter, before a sale to a third party, repurchase the lot from the building company upon payment to it of the cost of the improvements thereon, plus the one hundred dollars theretofore paid on the lot, and less the amount of any incumbrance placed or suffered to be placed thereon by the building company. It was further provided that if the building company had not made any such sale within fifteen months from the date of the conveyance of the lot to it, then that either party to the agreement might apply to the superior court of King county for an order directing the sale of the premises in the manner provided by law for the sale of real estate on execution, the net proceeds thereof to be divided between the parties pro rata, according to their respective interests.

It is alleged in the complaint that this contract was entered into through the "exclusive efforts" of the respondent.

The first question presented is, was the second contract a sale? The respondent asserts that it was; whilst the appellant contends that it created an agency or a trusteeship. We cannot construe the contract as a sale. A reading of the contract as a whole forces the conviction that it constitutes the building company an agent, coupled with an interest. It creates a mere cooperative plan whereby the appellant furnished the land, and the building company was to furnish satisfactory plans and specifications, and erect residences upon the lots with the view of selling the properties to third parties to the mutual advantage of the contracting parties. The contract, when read as an entirety, has none of the elements of a sale. It passes no present title, but merely agrees to pass the title to the building company in order that it might (a) secure a loan upon the property for fifty per cent of the cost

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of the building; (b) give a second mortgage to the appellant for the purchase price of the respective lots in excess of one hundred dollars; and (c) make sale of the respective lots to third parties, substituting the security given by the purchaser for the security given by the building company.

The execution of this contract at the instance of the respondent *ipso facto* withdrew the property therein specified from the operation of the first contract. There was no provision for a commission in the second contract, and therefore there can be no recovery.

The contracts are too lengthy to be set forth *in extenso*. The first contract covers ten pages of the printed brief; the second contract covers sixteen pages of the brief. We have, however, set forth sufficient of both contracts to render a discussion intelligible. The statute of frauds presents a second barrier to the recovery of a commission. There is a vital difference in the essential portions of the two contracts. It is apparent from the first contract that it was the desire of the appellant to convert the property into a cash equivalent, with all possible dispatch. It is also apparent that the second contract was made in the hope that it would quicken the sale of the remaining property, and thus redound to the mutual advantage of the first contracting parties. In the furtherance of this end, the appellant induced the respondent to enter into a second contract, which standing alone, gave no promise of cash sales. The second contract is complete in itself, except upon the question of a commission, and while not signed by the appellant, it is conceded that it caused it to be made. It makes no provision for a commission; hence there can be no recovery. The case, in this respect, is controlled by *Forland v. Boyum*, 53 Wash. 421, 102 Pac. 34. In that case the owner entered into a contract with a broker whereby she gave him the exclusive right for a period of thirty days to sell the property described in the contract, at a fixed price, upon an agreed commission. Later, upon the same day, the broker entered into a written contract with a purchaser for the sale

of the property, and received five hundred dollars as earnest money. The owner indorsed her approval upon the contract. The contract provided that if the purchaser defaulted, the earnest money should be forfeited to the broker "to the extent of their agreed upon commission." We held that the "suit, if sustained at all, must be sustained under the second contract;" that it was not a modification of the first contract, but that it was a "complete independent contract, certain in all its terms except the amount of commission to be paid;" that to ascertain the commission, parol testimony must be resorted to, and that the statute of frauds (Laws 1905, p. 110, § 1; Rem. & Bal. Code, § 5289; P. C. 203 § 3) stood as a barrier to a recovery.

In the case at bar the respondent contends that it is entitled to a twenty per cent commission stipulated in the first contract of sale. Testimony was offered on the part of the appellant to the effect that it was expressly agreed that there should be no commission flowing from the latter contract unless the respondent procured a sale of that property to a third party, which it made no pretense of doing. This testimony was not competent, and we only refer to it to show the wisdom of the law, and the necessity of adhering to it in all cases where a recovery is sought in the face of the statute.

Reversed, with instructions to dismiss.

CHADWICK, MOUNT, and PARKER, JJ., concur.

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Statement of Case.

[No. 10875. Department Two. July 15, 1913.]

J. H. ALLEN, *Respondent*, v. MIGLIAVACCA REALTY
COMPANY, *Appellant*.¹

APPEAL—REVIEW—FINDINGS. While findings of the trial court on conflicting evidence are of great weight, they are not conclusive on appeal where they are not supported by a fair preponderance of the evidence.

LANDLORD AND TENANT—ESTOPPEL TO DENY TITLE—EXCEPTIONS—FRAUD—EVIDENCE—SUFFICIENCY. While a tenant is not estopped to dispute his landlord's title when induced to accept the landlord through fraud or misrepresentation, the misrepresentation must relate to a matter not equally within his knowledge and must constitute the inducement to the lease; hence representations that the tenant did not own a building which he knew that he did own, being mere expressions of a legal conclusion on facts known to both parties, do not constitute fraud, in the absence of any relation of confidence between the parties; nor does acceptance of a lease under a threat of eviction constitute duress or fraud so as to relieve from estoppel to dispute the landlord's title.

LANDLORD AND TENANT—BUILDINGS OF TENANT—REMOVAL—ESTOPPEL. The tenant's right to remove a building under the conditions of a lease known to him, is waived, where he silently acquiesced in the claim of ownership by the landlord, accepted a new lease thereof, acknowledged such claim of ownership, and paid rent for the full term; and equity will not relieve from his mistake of law in supposing that he could collect the rent paid; since the principle of law was not doubtful and he was not free from blame.

LANDLORD AND TENANT—RENTS—RECOVERY. A judgment for the recovery of part of the rent paid, representing the rental value of a building belonging to the tenant, is not sustained, where the lease made no such segregation, and the amount was greatly in excess of the proportionate value of the building.

JUDGMENT—RES JUDICATA—MATTERS CONCLUDED. The dismissal of actions for conversion for insufficiency of proof is not conclusive of anything except that the defendant did not convert the property.

Appeal from a judgment of the superior court for Kitsap county, Bell, J., entered June 1, 1912, upon findings in favor of the plaintiff, in an action for money paid, tried to the court. Reversed.

¹Reported in 133 Pac. 580.

Bryan & Ingle, Chas. D. Fullen, and Arthur E. Griffin,
for appellant.

Jay C. Allen, for respondent.

ELLIS, J.—Plaintiff, as the assignee of one Louis Morin, seeks recovery of money alleged to have been paid as rent for a building situated on defendant's lot in Bremerton. It is alleged that Morin paid that portion of the rent sued for under the mistaken belief that he did not own the building. Plaintiff, in an attempt to trace Morin's title to the building, introduced a written lease of the lot, dated December 1, 1902, from William Bremer and wife to Elsie Gartner, for the term of three years and nine months, in which the lessee was given the right to "remove any building therefrom after expiration of this lease." November 17, 1904, the lease was assigned by Elsie Gartner to her husband, Charles Gartner, who on the same day assigned it for the benefit of his creditors to John B. Yakey. On March 8, 1905, Yakey assigned the lease to Carrie Smith, and "also the building situated on said premises with right to remove the same under terms of said lease." No transfer from Carrie Smith was shown, Morin testifying that he bought the building from one Benson, stating "three bills of sale were made from the court to Benson and from Benson to me," but he did not know where these written instruments were. Morin further testified that he did not know when he had acquired an interest in the building, but that for sometime prior to Aug. 18, 1908, he was the owner and in possession of it, and held the lot on which it was situated under an agreement to pay Bremer fifteen dollars a month ground rent. On August 18, 1908, Bremer sold the lot "with the appurtenances" to G. Migliavacca Investment Company. Prior to the sale, S. Migliavacca, agent of that company and of the defendant in all the transactions involving these premises, was told by Morin that the building belonged to him. After the purchase of the property Migliavacca exhibited the deed and stated to Morin: "when I

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bought this property I bought everything and nothing was reserved," and that Morin would have to pay fifty dollars a month rent or "get out." Thereupon Morin accepted a lease from the G. Migliavacca Investment Company. It was signed October 1, 1908, and recited the lease of,

"The building known as No. 312 Washington Street in said town of Bremerton, and the real estate and the premises on which the same is located together with the appurtenances thereunto pertaining, for the term of two years from and after the first day of October, A. D. 1908, at the monthly rent of \$50 per month, payable monthly in advance on the first day of each and every month during the period of this lease."

It is provided that the lessee may make any improvement or changes in the building, but that same is to be done at his expense and he is to permit no liens to be filed against the building; and that,

"All improvements, changes or alterations made by the lessee in said building or in said premises shall, at the expiration of this lease . . . become and remain the property of said lessor and shall not be removed from said premises by the said lessee."

It is further stipulated that,

"At the expiration of the terms of said lease . . . the said lessee will quit and surrender the said premises in as good state and condition as they now are or may be at any time placed in by the lessor or lessee ordinary wear and tear by the element or fire excepted."

Morin stated that he made no objection to signing the lease, "because," as he stated, "somebody else wanted the place and so I had to get out or pay the fifty dollars." On January 18, 1909, the G. Migliavacca Investment Company sold the lot "with the appurtenances," to Migliavacca Realty Company, the defendant in this action. Thereafter Morin continued to pay rent under the lease at the rate of \$50 a month to the defendant until December 1, 1910, and it is to recover the amount paid in excess of \$15 a month during that

period that this action is brought; the action being based upon the theory of an express agreement that \$15 monthly was paid for "ground rent" and \$35 monthly for the rent of the building.

Prior to the bringing of this action, Morin brought suit against Bremer for the value of the building, alleging that Bremer had sold it to the Migliavacca Investment Company. Verdict was rendered in Morin's favor, but a judgment notwithstanding the verdict was sustained by this court upon the theory that, if the building belonged to Morin, Bremer could not and did not sell it, and that Morin had the right to remove the same during his occupancy of the premises. *Morin v. Bremer*, 61 Wash. 62, 111 Pac. 1058. Thereafter, and prior to the bringing of this action, Morin brought two actions, one against the Migliavacca Investment Company, and the other against the Migliavacca Realty Company, for the value of the building, alleging a conversion thereof. The answer in each action was a denial generally of the allegations of the complaint, and the judgment recited the sustaining of a demurrer to the sufficiency of plaintiff's evidence made at the close thereof. This is all that appears in the record to indicate the issues upon which those causes proceeded and were determined.

The findings of the court may, for convenience in discussion, be condensed and grouped as follows: (1) that Morin was the owner of the building; that the Migliavacca Investment Company was apprised of this fact before the purchase; that Bremer had refused to sell it to that company; that, after obtaining a deed to the lot "with the appurtenances," the investment company exhibited the deed to Morin, claimed to have purchased the building and told him that if he did not pay \$50 a month rent he would be ousted; and that the defendant, Migliavacca Realty Company, had notice and knowledge of Morin's claim and was not a *bona fide* purchaser of the building. (2) The court also found that Morin, believing these representations, entered into and signed the

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lease; that the representations were false; and that, but for the representations, Morin would not have agreed to pay rent for the building; that, of the rent so paid, the sum of \$785 was collected by the defendant for the use and occupation of the building, and was paid by Morin "in ignorance of his true rights and in reliance on the representations so made to him." Judgment was entered accordingly, and the defendant has appealed.

The case is here for a trial *de novo*, and it is incumbent upon us to determine whether the evidence supports these findings. We are not bound by them as we would be by a verdict of a jury if supported by any evidence. The findings of the trial court upon conflicting evidence are entitled to great weight, but when we are convinced that they are not supported by a fair preponderance of the evidence, it is our duty to disregard them. *Dougherty v. Soll*, 70 Wash. 407, 126 Pac. 924.

In pursuance of this rule, we have made a painstaking examination of the evidence, and we are satisfied that the first group of facts found as above condensed is fairly sustained. As to the second group, we are forced to a contrary conclusion. To sustain this action the respondent assumed the same burden of proof that would have rested upon Morin had the action been prosecuted by him. That a tenant is usually estopped to deny his landlord's title, regardless of the validity of that title, is law so familiar as to require no citation of authority. But this rule is subject to the well-recognized exception that, where the tenant in possession is induced to accept another as his landlord through the fraud or misrepresentation of such other, the estoppel to deny the landlord's title will not be effective. 18 Am. & Eng. Ency. Law (2d ed.), 416. It is upon this exception that the respondent is forced to rely. But the fraudulent misrepresentation, to be available in this relation, must be so established and must be of such nature and made under such circumstances as would make it available in avoiding a written contract in other re-

lations. Where, as here, there exists no confidential or fiduciary relation, the misrepresentation must relate to a matter not equally within the knowledge of or not equally open to inquiry by the party asserting the fraud. The representation must constitute the inducement to the lease. It must have been believed and relied upon by the party to whom it is made and must have actually deceived him to his injury. These things must be established by a preponderance of the evidence, in order to overcome Morin's estoppel to deny the investment company's title and right to make the lease growing out of his acceptance of the lease of October 1, 1908. Smith, Law of Fraud, § 260.

The evidence signally fails to meet these requirements. There was no confidential relations existing between the parties. Morin knew that he owned the building and knew that Migliavacca knew it. Morin testified that he had told Migliavacca so prior to the purchase and that Migliavacca said he so understood. Morin knew that the lease under which he was in possession when the Migliavacca Investment Company bought the land gave him the right to remove the building. He testified that such was also Bremer's agreement with him. He not only knew the fact, but knew his rights by reason of the fact. He knew that he owned the building and that he had the right to remove it. Yet, throughout the whole negotiations with Migliavacca, he never once offered to remove the building or expressed any desire to remove it. On the contrary, he testified that he never at any time made any effort or took any step in that direction, and admitted that he had no place to which to remove it. There is no evidence that Migliavacca ever at any time, either before or at the time the lease of October 1, 1908, was signed, prohibited the removal of the building. The nearest approach to such an inference is found in Morin's statement, elicited by repeated objections of his counsel suggesting the answer, which was at most a mere conclusion, that he, Morin, could not move the building as Migliavacca told him he, Migliavacca, was

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the owner. In this same connection Morin testified that at the time he signed the lease he did not make any claim to ownership of the building. He also stated at that time he made no objection to the terms of the lease but had made objections before. What those objections were he did not say. When asked if it was not his motive when he signed the lease to raise no question as to his ownership of the building but to bring suit against Bremer and get something for the building without removing it, he evasively answered: "At the time I signed the lease there was not a word said about anything else." Though he claimed to have signed the lease in reliance upon Migliavacca's representation that the company had bought the building, he also said that he signed it upon advice of his then attorney, Crawford. Though Crawford testified that Morin was mistaken in this, it certainly negatives the idea of such reliance. Moreover, he had no right to so rely in the face of his own knowledge that he owned the building and was in possession of it. Giving full credence to all of Morin's testimony on the subject, Migliavacca's representations, when he exhibited the deed to Morin and claimed the building because the deed contained no reservations, amounted only to a misrepresentation as to the legal effect of the deed. It was a mere expression of a legal conclusion on facts known to both parties. In short, it was a mere expression of opinion. This does not constitute fraud in the absence of any relation of confidence between the parties. Smith, Law of Fraud, § 14. So far as the record shows, Morin made no inquiry of Bremer, the other party to the sale. It seems to us that Morin's own testimony is hardly capable of any other construction than that he knew he had the right to remove the building so long as he remained in possession under the lease from Bremer, and on the expiration of that lease and the termination of the continued tenancy from month to month; yet, rather than remove the building and thus lose the location, he deliberately determined to forego that right and pay a rental of \$50 a

month. It is most difficult to see by what show of right he could leave his building upon the appellant's land and claim its rental value. It was certainly not incumbent on the appellant to remove the building in order to avoid such result. Nor does the fact, if it be a fact, that Morin was induced to accept the lease under a threat of eviction, constitute either duress or fraud so as to relieve him from the estoppel to dispute the landlord's title or right to make the lease. *School District of Harrisburg v. Long* (Pa.), 10 Atl. 769; *Hockenbury v. Snyder*, 2 Watts & Serg. (Pa.) 240; *Andrew v. Carlile*, 4 Colo. App. 336, 36 Pac. 66; *Williams v. Wait*, 2 S. D. 210, 49 N. W. 209, 39 Am. St. 768.

Much argument is devoted to the effect of the decision in *Morin v. Bremer*, *supra*, as *res judicata* on the one hand, and to the dismissal of the actions for conversion brought by Morin against the two Migliavacca companies as having the same effect on the other hand. In *Morin v. Bremer*, it was merely decided that Morin, as the owner of the building, had the right to remove it and that it could not be sold by Bremer so long as Morin was in possession under the lease from Bremer or its extension from month to month. It is *res judicata* as to nothing more. The two actions for conversion were dismissed for insufficiency of proof. What the proof was, does not appear. Their dismissal can hardly be held conclusive of anything except that the appellant had not converted the building. These decisions have no bearing on the present action other than as tending to show that Morin persistently mistook his remedy in failing to remove the building.

We find no merit in the suggestion that the lease was made under such a mistake of law as to relieve against the estoppel to deny the right of the Migliavacca Investment Company to make it. The remedy by removal of the building was obvious, being pointed out by the very lease under which Morin claimed and by the agreement with Bremer under which Morin remained in possession up to the time of the sale. His mistake in supposing that he could, with full knowledge of his ownership

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and possession, silently acquiesce in another's assumed ownership of the building, lease it from the other by a lease acknowledging the other's title, pay the rent for the full term and then recover the rental paid after having remained silent all the while, was an inexcusable mistake. Though it has been sometimes held that equity will relieve against a mistake of law, it is only where the principle of law is confessedly doubtful and when the party seeking relief is wholly innocent of blame. *MacKay v. Smith*, 27 Wash. 442, 67 Pac. 928. We have been cited to no authority, and a diligent search convinces us there is none, which holds that when one, knowing the facts and knowing his rights, waives his obvious remedy by a solemnly executed lease, under the mistaken supposition that he can invoke another remedy, will be relieved from the obligations and estoppels of his lease by reason of such mistake.

The judgment is erroneous in any event. The action was for the return of an alleged agreed rental of \$35 a month paid for the building. There was no sufficient evidence of such an agreement. The unambiguous written lease made no such provision. While Morin testified that, of the \$50 monthly rent reserved for the premises, \$15 was ground rent and \$35 for the rent of the building, Migliavacca denied this and Morin himself contradicted it when he said that, when the lease was made, nothing was said about the building. Moreover, the evidence showed that, when the lease was made, the lot was worth \$3,500 and the building was worth only \$900. That is the amount Morin claimed as the value of the building in each of the actions for conversion and also in his action against Bremer. It is unbelievable that either Morin or Migliavacca, had they intended a segregation, would have thought of so inequitable a division. There was no evidence of the actual rental value of the building aside from the lot. Even if the fraud were conceded, the evidence would not sustain the judgment.

It is impossible to sustain this judgment upon any sound theory. It is reversed, and the cause is remanded with direction to dismiss.

FULLERTON, MAIN, and MORRIS, JJ., concur.

[No. 10939. Department Two. July 16, 1913.]

ELIZA FIELD, *Respondent*, v. SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, *Appellant*.

ELLA FIELD, *Respondent*, v. SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, *Appellant*.¹

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—SURPRISE—DILIGENCE. A new trial for newly discovered evidence is properly denied, where the new witnesses denied that they would testify as claimed; and their evidence was sought to meet evidence of the plaintiff showing the effect of her personal injuries subsequent to the first trial of the action, which was introduced at a second trial without objection to its relevancy or any claim of surprise.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$4,000 for personal injuries, rendered at the second trial of the action, two years after the first trial and four years after the accident, cannot be held excessive because the evidence at the first trial tended to show only temporary injuries, where it was sustained by the evidence at the second trial.

Appeal from a judgment of the superior court for Clarke county, McMaster, J., entered May 24, 1912, upon the verdict of a jury rendered in favor of the plaintiffs, in consolidated actions. Affirmed.

Carey & Kerr, A. L. Miller, and Omar C. Spencer, for appellant.

Frank E. Vaughan and Hayden & Langhorne, for respondents.

MORRIS, J.—These consolidated cases come to this court on appeal for the second time. The first judgments were re-

¹Reported in 133 Pac. 611.

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versed and new trials granted because of an erroneous instruction to the jury. *Field v. Spokane, P. & S. R. Co.*, 64 Wash. 445, 117 Pac. 228. Upon the second trial, respondents obtained judgments for respectively \$4,000 and \$500, and the railway company appeals.

The facts are all stated in the first opinion and will not again be referred to.

Two assignments of error are now urged. (1) That the lower court erred in denying a motion for a new trial, based upon newly discovered evidence as to the injuries sustained by Eliza Field; and (2) that each of the verdicts is excessive.

The first error is based upon the fact that, upon the second trial, an osteopath, who had been treating Mrs. Field subsequent to the first trial, testified to injuries to the spine and a shortened leg, causing her to walk with a limp, and that these injuries were of a permanent nature. The amended complaint, upon which the case of Eliza Field was tried, makes no specific mention of injuries to the spine or a shortened leg, but confines itself to a general allegation that she was severely bruised and injured so that she became lame, sick and sore, suffering great pain, and her health permanently injured. At the first trial, no evidence was given tending to show any permanent injury to the spine, nor mention made of a shortened leg. No objection was, however, made to this evidence upon the second trial, which took place nearly four years after the accident, appellant accepting the issue and contenting itself with offering evidence of several of the jurors who were in attendance at the time of the first trial to the effect that Mrs. Field was not then lame nor limped when walking except when her attention was evidently called to it.

Upon its motion for a new trial, appellant read affidavits to the effect that upon a new trial the persons named in the affidavits would testify that Mrs. Field was not lame, did not walk with a limp, nor complain of injury to her spine. Respondents produced affidavits from these same persons to the effect that they had been misquoted in appellant's affidavits,

and would not testify as there indicated, but would in most cases testify in favor of respondent's contention as to the then condition of Mrs. Field. We can find no error in the denial of the motion for new trial upon this claim of newly discovered evidence. It occurs to us that, if appellant had been surprised at the character of the evidence as to the extent and nature of Mrs. Field's injuries, the proper way would have been to have suggested its surprise and unpreparedness to meet such issue at the time the evidence supporting it was introduced, or ask for an appointment of physicians to examine her. Not having done so, nor in any way raising the question of the relevancy of this testimony at the time of the trial, but having accepted the issue, it would be an improper direction to now say appellant should be afforded the opportunity of meeting this testimony, when it in no way sought to take advantage of any of the opportunities to defend against it which might have been afforded it at the time of the trial. We are not, therefore, prepared to say that the lower court erred in denying this phase of the motion for new trial.

Nor are we prepared to say the damages in either case are excessive. Medical testimony offered at the first trial, and which was made a part of the evidence at the second trial, would indicate that Mrs. Field's injuries were only of a temporary nature. The evidence offered at the second trial as to her condition subsequent to the first trial, and at the time of the second trial, which occurred nearly two years after the first trial and four years after the accident, sustains respondents' contention that Mrs. Field suffered a severe injury, and that its effects are serious, painful and permanent. We must, therefore, accept the verdict as a finding by the jury that the condition as shown at the time of the second trial is the true one rather than that shown at the time of the first trial, and with this view we are not prepared to say the damages are excessive. The injury to Ella Field was slight, and of a temporary nature. We cannot say, however, that the award of \$500 in her case is excessive to such an extent

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as to indicate passion and prejudice on the part of the jury, or call for any reduction by this court.

Neither verdict will be disturbed, and the judgments are affirmed.

ELLIS, MAIN, and FULLERTON, JJ., concur.

[No. 11248. Department One. July 16, 1913.]

ALICE WOODS, *Appellant*, v. NORMAN D. McIVOR *et al.*,
Respondents.¹

SALES—WARRANTY—BREACH—EVIDENCE—SUFFICIENCY. The purchaser cannot recover for breach of warranty of an automobile in that it did not meet representations as to its quality, where both she and the son testified that it was in proper condition when purchased and not materially out of repair when returned.

SALES—CONDITIONAL SALES—RECORDING—BONA FIDE PURCHASER—TITLE. A sale of an automobile cannot be rescinded by the purchaser on the ground that the seller was without title, holding only by a conditional bill of sale, where the conditional bill of sale had not been recorded, since the purchaser was protected by the statute.

Appeal from a judgment of the superior court for Spokane county, Yahey, J., entered December 2, 1912, upon findings in favor of the defendants, in an action for money paid, tried to the court. Affirmed.

Denton M. Crow, for appellant.

Barnes & Dillard, for respondents.

CHADWICK, J.—On or about the 27th day of May, 1912, plaintiff purchased of the defendant a certain automobile. The court below found, upon conflicting evidence, that the price agreed to be paid was \$1,250, of which \$750 was paid down. The car was used by plaintiff's son, it having been bought, as plaintiff says, for his use. About the 10th of August following, the son determined to leave the city of Spo-

¹Reported in 133 Pac. 590.

kane, and negotiations tending to a return of the car were opened up between plaintiff and the defendant. Defendant was uncertain as to whether he would repurchase the car until after he had made some examination of its gears and inner workings. On the second day of September, 1912, the car was stolen and has not since been recovered. Plaintiff brought this action to recover the amount paid, and \$109 paid out for repairs and up-keep. She sets up a breach of warranty in that the car did not meet the representations made by the defendant as to its quality, and also claims a right to rescind the contract on the ground that, at the time the car was purchased, it was held by the defendant under a conditional bill of sale, the title being in a third party.

There is some discussion of the pleadings and remedies sought by plaintiff; but we deem it unnecessary to enter upon a technical discussion of these questions, for the reason that plaintiff's proof is entirely insufficient to warrant a judgment in her favor on account of a breach of warranty. She testified that the car was in proper condition at the time she purchased, as did also her son, and she further testified that, so far as she knew, the car was not materially out of repair at the time it was returned to the defendant.

Neither can the plaintiff rescind the contract. The testimony shows that the conditional bill of sale had never been recorded and her purchase from the defendant would have been protected under the statute. *Worley v. Metropolitan Motor Car Co.*, 72 Wash. 243, 130 Pac. 107; *American Multi-graph Sales Co. v. Jones*, 58 Wash. 619, 109 Pac. 108.

Finding no error, and being satisfied that the evidence sustains the findings of the court, the judgment is affirmed.

GOSE, MOUNT, and PARKER, JJ., concur.

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[No. 11149. Department One. July 16, 1913.]

JOHN RUUTH *et al.*, *Appellants*, v. MORSE HARDWARE
COMPANY, *Respondent*.¹

FRAUDULENT CONVEYANCES—DEED FROM HUSBAND TO WIFE—RIGHTS OF CREDITORS—SUBSEQUENT PURCHASER. A conveyance by husband to wife of community property without a valuable consideration, after contracting a community debt, is constructively fraudulent as to the community creditor.

JUDGMENTS—LIEN—COMMUNITY DEBT—HUSBAND AND WIFE. Where one of the parties jointly interested in the purchase of land quit-claimed to his wife in fraud of creditors before acquiring title, title acquired jointly, after judgment against him, meets the lien of the judgment, and one of his partners thereafter taking a warranty deed from him and his wife is not an innocent purchaser, where he knew his relation to the property, and at his instance advanced his share of the purchase price for the final payment.

SUBROGATION—RIGHT TO PAYMENT—BY JOINT PURCHASER. One of the joint purchasers of land, who advanced the sum necessary to make final payment, after judgment lien against one of the other vendees who was unable to pay his share, is entitled to be subrogated to the extent of such advances; as he is not a mere volunteer.

APPEAL—REVIEW—PLEADING—AMENDMENT TO CONFORM TO PROOF. In an action to quiet title to land, evidence admitted without objection showing that the plaintiff was entitled to be subrogated to the extent of advances made by him for the benefit of his grantor, entitled him to an amendment of the pleadings to conform to the proof, which the supreme court on appeal will deem to have been made.

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 28, 1913, dismissing an action to quiet title, after a trial on the merits. Modified.

Tucker & Hyland, for appellants.

Wm. Parmerlee and Pope Higgins, for respondent.

Gose, J.—This is a bill in equity to quiet the title to real estate situated in the city of Seattle. The defendants pleaded title acquired at a sale upon an execution issued upon an or-

¹Reported in 133 Pac. 587.

dinary money judgment. A decree was entered in favor of the defendant, from which the plaintiffs appeal. The stipulated facts are as follows:

On the 1st day of October, 1906, the Grand Boulevard Improvement Company, a corporation, being the owner of lots 19 to 25 inclusive, in block three, Buena Vista addition to the city of Seattle, entered into a written contract whereby it agreed to sell these lots to the appellant John Ruuth, and F. W. Ladd and George H. Gerrish, in consideration of the payment by them of \$4,000. Ruuth, Ladd and Gerrish paid \$800 at the time the contract was made, and agreed to pay the remainder in installments of \$800 each upon fixed dates. Time was expressly made of the essence of the contract. The contract provided that it should not be sold, assigned or transferred by the vendees. Final payment was made on the 2d day of May, 1910, and the vendor then conveyed the lots to the vendees, each of whom took an undivided one-third interest in the property. On the 2d day of December, 1908, F. W. Ladd, in consideration of one dollar, gave a quitclaim deed to the lots to his wife, Idella Ladd, which deed was filed for record on the following day. On the 3d day of May, 1910, F. W. Ladd and his wife Idella conveyed by warranty deed lots 19 and 20, of the lots first described, to the appellant John Ruuth, which deed was recorded on the 27th day of May. On the 30th day of July, 1908, F. W. Ladd and one Hall, as co-partners contracted a debt with the respondent. On the 7th day of November, following, the respondent brought suit against F. W. Ladd upon that account. A judgment was entered therein on the 4th day of December, 1908, in favor of the respondent and against F. W. Ladd. On the 10th day of May, 1911, an execution was issued upon the judgment and the lots in controversy were levied upon, and on the 24th day of June following, the lots were sold to the respondent at this execution sale. On the 11th day of July, 1912, the sheriff regularly executed a deed to the purchaser. During all of

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these times F. W. Ladd and Idella Ladd were husband and wife.

It will be remembered that the contract of purchase was made in October, 1906; that Ladd, in consideration of one dollar, quitclaimed to his wife on the 2d day of December, 1908; that the deed was filed for record the next day; that the judgment was entered two days later; that final payment was made on the contract and the property was conveyed to the vendees on the 2d day of May, 1910; and that, on the following day, Ladd and wife attempted to convey the lots in controversy to the appellant John Ruuth, by a deed of warranty.

The appellant John Ruuth testified that he purchased from the Ladds without an abstract of title; that he did not have the title examined; that he had no actual notice of the judgment; that he had made all the payments on the contract; that F. W. Ladd had repaid him in each instance except as to the final payment; that he made the final payment for Ladd upon the lots; that, in consideration of \$433.33 of the amount then advanced by him, the Ladds conveyed to him their undivided one-third of the two lots in controversy; and that they gave to him their joint note for the excess.

Upon these facts, it is obvious that the debt of Hall and Ladd was a community debt of the Ladds, and that the conveyance of Mr. Ladd to his wife was made without a valuable consideration after the debt had been contracted. The conveyance was constructively fraudulent as against the respondent.

The appellants contend, however, that they acquired the property without either actual or constructive notice of the judgment lien, and that they are innocent purchasers. In support of this view, they cite *Clerf v. Montgomery*, 15 Wash. 483, 46 Pac. 1028, 48 Pac. 733; *Anders v. Bouska*, 61 Wash. 393, 112 Pac. 523; and *Sawtelle v. Weymouth*, 14 Wash. 21, 43 Pac. 1101. In the *Clerf* case, the husband conveyed the legal title to the premises to his wife. Thereafter, Clerf, whose

claim antedated the deed to the wife, attached the property. Subsequent to the filing of the writ of attachment in the office of the county auditor, the wife sold and conveyed the property for a valuable consideration. Five days later, Clerf obtained a judgment in the attachment suit against the husband. The trial court found that the conveyance to the wife was made with intent to defraud the creditors of the husband. The purpose of the suit was to set aside the deed to the wife as fraudulent. It was held that "the record title" was in the wife, and that the writ of attachment sued out against the husband only did not give constructive notice to the purchaser; that he had no actual notice; and that he was a *bona fide* purchaser. In the *Sawtelle* case the same rule was applied. There the husband had conveyed the legal title to the wife before the judgment had been entered against him, and she had conveyed it to the purchasers for value after the entry of the judgment. The *Anders* case announces a like principle.

It will be observed that, in each of these cases, the wife held the record legal title before there was any attempt upon the part of the creditor to obtain an involuntary lien against the property, and that in each instance the suit was against the husband only.

The principle announced in these cases is not controlling, for two reasons: (a) The appellant husband dealt exclusively with F. W. Ladd, knew his relation to the original contract for the purchase of the property, and advanced the consideration for the final payment at his instance; and (b) when Ladd attempted to convey to his wife, he had no title. When the title was later acquired, it met the judgment lien, and was subject to it.

The appellants next contend that, having paid to the common grantor \$433.33 of the purchase price for the benefit of the Ladds, upon a joint contract, where there was no severalty of interest, the payment being necessary for the protection of their own interest in the property and a prerequisite to the acquisition of title, in equity and good con-

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science they should be subrogated to the rights of the vendor, to the extent of such payment, and legal interest from the date of the payment; and that it should be decreed a lien upon the respondent's undivided one-third interest in the property. As sustaining authority, they rely upon *Murray v. O'Brien*, 56 Wash. 361, 105 Pac. 840, 28 L. R. A. (N. S.) 998; *Cole v. Malcolm*, 66 N. Y. 363; and *Arnold v. Green*, 116 N. Y. 566, 23 N. E. 1. In the *Murray* case, in discussing the doctrine of subrogation, we said:

“The right of subrogation under the better rule applies in cases where a party who has an interest in the property and who does not stand as a mere volunteer pays a debt owing in whole or in part by another, to protect his own rights or to save his own property. The remedy is no longer limited to sureties and quasi sureties, but is freely applied by courts of equity in all cases where good conscience and equity dictate that a debt paid by one under any sort of legal coercion ought to be paid by another.”

In *Cole v. Malcolm*, the principle of subrogation is thus stated:

“It is generally and most frequently applied in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is only secondarily liable for the debt; but it is also applicable to cases where a party is compelled to pay the debt of a third person to protect his own rights, or to save his own property.”

Arnold v. Green, announces the broad principle that one who pays the debt of another to avoid losing his property is not a stranger or volunteer, but that he may be protected by the equitable doctrine of subrogation. In the case at bar, the parties were joint purchasers. Each was liable for the payment of the full purchase price. Payments had been made upon the property before the final payment, and time was made the essence of the contract. Ladd could not meet his last payment, and the appellant husband, at his request, advanced the money for him direct to the vendor. The principles of equity will not permit the respondent to reap the

benefit of this payment. The vendor held the legal title as security for the payment of the purchase price, and the appellants ought to be subrogated to that right. They were in no sense volunteers, but on the contrary they were compelled to advance the money to protect their interest in the property.

The respondent, among other cases, has cited *Asher v. Sekofsky*, 10 Wash. 379, 38 Pac. 1133; *Morris v. White*, 36 N. J. Eq. 324; *Downer v. Wilson*, 33 Vt. 1; and *Banta v. Garmo*, 1 Sandf. Ch. 383. It was held in the *Asher* case that "one who merely lends money to pay purchase money is not subrogated to the vendor's lien." The distinction between the payment of a debt by a volunteer and by one who makes a payment for another to protect his own property interest is recognized in *Morris v. White*, where the court said:

"The doctrine of subrogation is not applied to the mere stranger or volunteer who has paid the debt of another, without any assignment or agreement for subrogation, without any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his own."

Downer v. Wilson and *Banta v. Garmo* recognize this distinction. The respondent has cited no authority where, at the time the money was advanced to pay an incumbrance, the party advancing it had an interest in the incumbered property to protect.

The appellants filed an amended reply setting forth the advancement of Ladd's portion of the last payment to the common grantor to complete the purchase. The prayer was either for judgment as prayed for in the complaint, or for subrogation to the extent of \$433.33. The testimony was all admitted without objection after the following statement of counsel for the respondent:

"Mr. Parmerlee: It has been agreed by counsel that the answer might be amended in a couple of respects and that it be denied by the plaintiffs; and the plaintiffs also desire to amend their reply by adding a part to it. There will be no

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objections to that as to time, but there will be an argument as to the sufficiency of it at the close of the case."

The respondent contends that the matter set forth in the amended reply is a departure from the cause of action pleaded in the complaint, and that the scope of the complaint may not be enlarged by the reply. This may be conceded, but the argument does not meet the situation. The appellants were privileged to plead all the facts in their bill, and to pray for general equitable relief. This would have entitled them to subrogation. When the evidence had been submitted without objection, the court should have treated the bill as amended to meet the issues as actually made in the trial, or should have directed an amendment of the bill to conform to the case as it then stood. Instead of doing this, the court entered a decree quieting title in the respondent in harmony with the prayer in its answer, and provided in the decree that the question of the right of the appellants to subrogation was not adjudicated "for the reason that said question of subrogation could not be considered by the court in the trial of the case on account of it not having been properly pleaded." There is no need of further litigation to determine the appellants' right to subrogation. The facts are before us for a trial *de novo*, and they are either admitted or undisputed.

The case will be remanded with directions to modify the decree so as to give the appellants a lien upon the property described in the complaint for \$433.33, with legal interest from May 2, 1910, the date it was paid. The appellants will recover their costs.

CHADWICK, MOUNT, and PARKER, JJ., concur.

[No. 11006. Department Two. July 18, 1913.]

GERARD-FILLIO COMPANY, INCORPORATED, *Respondent*, v.
JAMES McNAIR *et al.*, *Appellants*.¹

BROKERS—ACTIONS—ISSUES AND PROOF—JUDGMENT. In an action upon a written contract for a broker's commission, where the contract sued on was admitted and defendants' affirmative defense of a subsequent modification was not sustained, it is error for the court to grant judgment for the amount it considers reasonable for the services rendered, rather than for the specific sum agreed upon.

Cross-appeals from a judgment of the superior court for King county, Everett Smith, J., entered September 7, 1912, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Reversed on plaintiff's appeal.

Kerr & McCord, for appellants.

Hamlin & Meier, for respondent.

MORRIS, J.—The respondent brought this action to recover six hundred dollars claimed by it to be the balance due upon a commission for bringing about an exchange of properties between appellants and third parties.

The facts are set forth in detail in *Gerard-Fillio Co. v. McNair*, 68 Wash. 321, 123 Pac. 462, where we were called upon to review a judgment granted respondent upon the pleadings. That judgment was reversed with instructions to the lower court to proceed with the trial, the court holding that appellants were entitled to put in their proof and to a judgment in their favor, if sustaining the allegations of their affirmative answer pleading a subsequent partly performed oral modification of the original written contract. Under this direction, the case has been tried, the court awarded respondent a judgment for four hundred dollars, and both parties appealed.

The original contract being admitted, it is evident that

¹Reported in 133 Pac. 462.

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there was only one issue before the court, and that was as indicated by this court in its opinion on the first appeal, the modification of the written contract by subsequent oral agreement which had been partly performed. The lower court in its findings of fact expressly holds and finds, "That the said defendants have failed to prove their affirmative defenses pleaded herein." Having so found, nothing remained for the lower court but to enter judgment for respondent as prayed for under the terms of the original written contract. As it was evident from the issues as framed, either respondent was entitled to judgment as prayed for under the original contract, or appellants were entitled to the benefit of the subsequent modification pleaded. The lower court however, adopted a new theory, and gave judgment for the sum he believed represented a fair commission to respondent for the services rendered referring to an attempted adjustment of the differences between the parties in which the appellants expressed a willingness to pay respondent six hundred dollars, making the balance now due four hundred dollars. Believing this sum to be a proper compensation for respondent, judgment was granted accordingly.

Both parties complain of this judgment, appellants contending the court was in error in awarding judgment in any sum upon the theory that they had sustained the affirmative defenses, and respondent contending that, under its findings, the court should have awarded it judgment for six hundred dollars. There was but one issue before the court. The respondent was entitled to judgment of six hundred dollars or nothing. There is no theory known to the law under which the judgment granted can be sustained. When a litigant comes into court pleading a specific contract as his right of recovery, there is no question of equity as between the parties submitted to the court. Such litigant must rely on the contract pleaded or not at all. The court cannot make a new contract or substitute its opinion of values for that expressed in the contract. The contract being admitted, and the court

finding that the appellants had failed in their plea of a subsequent modification, it should have been enforced and judgment granted accordingly. Not to do so was error.

We believe the court was right in its finding that the affirmative defenses had not been sustained. It only remains to direct the proper judgment. The judgment is reversed and set aside and the cause remanded with instructions to the lower court to enter judgment for respondent in the sum of \$600.

ELLIS, MAIN, and FULLERTON, JJ., concur.

[No. 11108. Department Two. July 18, 1913.]

A. B. RICHMAN, *Respondent*, v. WENAHA COMPANY,
Appellant.¹

JUDGMENT — DEFAULT — NOTICE — APPEARANCE. Appearance in a case prior to entry of default entitles the defendant to notice of all subsequent proceedings, and it is therefore technical error to grant the default without notice.

JUDGMENT—VACATION—DISCRETION. Technical error in granting a default judgment does not establish abuse of discretion in refusing to open the default, unless the error was prejudicial.

CORPORATIONS—ACTIONS—VENUE—JURISDICTION. Under Rem. & Bal. Code, § 206, providing in what counties an action may be brought against a corporation, the court has no jurisdiction to enter judgment where the action was brought in the wrong county.

JUDGMENT—VACATION—ABUSE OF DISCRETION. It is an abuse of discretion to refuse to open a default judgment entered after motion for change of venue showing that the court had no jurisdiction, although the application for change of venue was not made until after the motion for default.

Appeal from a judgment of the superior court for Benton county, Holcomb, J., entered September 5, 1912, upon findings in favor of the plaintiff, denying a motion to vacate a judgment. Reversed.

¹Reported in 133 Pac. 467.

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Opinion Per MORRIS, J.

J. G. Thomas, W. A. Toner, and McGregor & Fristoe, for appellant.

H. Dustin, for respondent.

MORRIS, J.—Appeal from an order denying motion to open up a default, and judgment entered thereon. The action was brought in Benton county, and service was made upon the appellant corporation in Walla Walla county on July 30, 1912. On August 22, no appearance having been made, respondent made and filed a motion for default. On August 28, appellant filed a demurrer and motion for change of venue to Walla Walla county, setting forth in support of the motion for change of venue that it was not then, nor at the time when the cause of action arose, transacting any business in Benton county, nor had any office therein for the transaction of business, or person representing it upon whom process might be served. On September 4th, without notice to appellant, the motion for default was granted and judgment entered. On September 18, appellant moved to set aside the default, which being denied, it appeals.

Appellant having appeared in the case prior to the entry of default, was entitled to notice of all subsequent proceedings under Rem. & Bal. Code, § 262 (P. C. 81 § 231). It was therefore technical error to grant the default without notice. Rulings of lower courts upon motions to open up default, being so largely a matter of discretion, will not be disturbed here even though technical error might be committed, unless it appears that such a ruling is prejudicial to defendant, or that more than technical error has been committed. We believe this to be a sound rule, and before we will disturb the ruling of the lower court in such matters it must affirmatively appear that more than a technical right has been invaded. We think such a showing was made upon the application for change of venue. Rem. & Bal. Code, § 206 (P. C. 81 § 107), provides:

“An action against a corporation may be brought in any county where the corporation transacts business or transacted business at the time the cause of action arose; or in any county where the corporation has an office for the transaction of business or any person resides upon whom process may be served against such corporation, unless otherwise provided in this code.”

It was held in *McMaster v. Advance Thresher Co.*, 10 Wash. 147, 38 Pac. 670, that, under this section as it existed prior to the amendment of 1909, which enlarged its scope, the court had no jurisdiction to enter judgment against a corporation when the action was brought in the wrong county. This ruling was followed in *Hammel v. Fidelity Mutual Aid Ass'n*, 42 Wash. 448, 85 Pac. 35, and *Whitman County v. United States Fidelity & Guaranty Co.*, 49 Wash. 150, 94 Pac. 906. No jurisdiction having been acquired by the lower court to enter judgment of any character, it was more than a technical error to enter judgment of default without notice after appearance. It must, therefore, be held that the lower court was not exercising a sound legal discretion in the entry of judgment when, upon the face of its record, it affirmatively appeared that it was without jurisdiction; and for this reason the judgment is reversed.

MAIN, ELLIS, and FULLERTON, JJ., concur.

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Opinion Per PARKER, J.

[No. 11286. Department One. July 18, 1913.]

ROBERT LAVNER, *Respondent*, v. INDEPENDENT LIGHT & WATER COMPANY, *Appellant*.¹

NUISANCE—PRIVATE NUISANCES—SMOKE AND SOOT—LIABILITY—RELIEF. Where smoke, soot, and fumes from a gas manufacturing plant were cast upon plaintiff's residence property to such an extent as to become the direct cause of substantial discomfort and inconvenience and to materially diminish its earning power, the plaintiff is entitled to an injunction and to damages for the losses sustained.

Appeal from a judgment of the superior court for Clarke county, Mitchell, J., entered October 8, 1912, upon findings in favor of the plaintiff, in an action for damages and to enjoin a nuisance, tried to the court. Affirmed.

Charles A. Johns and Miller, Crass & Wilkinson, for appellant.

Donald McMaster, for respondent.

PARKER, J.—The plaintiff commenced this action seeking recovery of damages from the defendant, which he claims resulted to him from the casting of large quantities of soot, lamp black, and noxious fumes from the defendant's gas manufacturing plant upon residence property owned by him and situated near the defendant's plant, and also seeking an injunction restraining the continuation thereof; claiming such casting of soot, lamp black, and noxious fumes upon his property to be a nuisance. A trial before the court resulted in findings and judgment in favor of the plaintiff awarding him \$300 damages for past injuries and also an injunction as prayed for. From this disposition of the cause, the defendant has appealed.

Some two years prior to the commencement of this action, appellant constructed an oil gas manufacturing plant in the city of Vancouver, which it has operated since then. Since several years prior to the construction of appellant's plant,

¹Reported in 133 Pac. 592.

respondent has owned three dwelling houses situated near its present location. The evidence tends strongly to show, and we think is amply sufficient to warrant the trial court in believing, the following: In the operation of appellant's plant, oil is used as fuel, and there is emitted therefrom smoke, soot, lamp black, and noxious fumes. The prevailing winds are directly from appellant's plant towards respondent's dwelling houses, and prior to the trial of this action there was cast upon respondent's property from appellant's plant large quantities of smoke, soot, lamp black, and noxious fumes, which also penetrated into his houses, thereby rendering them much less desirable for occupancy as dwellings than they would be in the absence of the smoke, soot, and noxious fumes he complains of. This compelled the respondent to rent his dwellings at much less per month than he would otherwise have been able to obtain for them, and it also resulted in his having some difficulty in keeping his tenants, some of whom vacated his houses for that reason. Respondent was thus damaged, up to the time of the commencement of this action, by reason of loss of rents at least to the extent of \$300, which sum the court found in his favor. At the time of the trial of this action, continued operation of appellant's plant in the same manner was threatened.

This, like all cases of nuisance of this character, must depend upon its own peculiar circumstances, in view of the fact that appellant was carrying on a lawful business and respondent's injury resulted from the operation of that business. The law has been unable to lay down any very exact test as to when a person damaged by smoke and fumes from such a plant is entitled to relief by way of injunction or damages. As said in 1 Wood, Nuisances (3d ed.), § 497:

"No precise test can be given as applicable to all cases, but the question of nuisance is one of *fact*, and must be determined by the jury from the circumstances of each case."

We think, however, in view of all the circumstances surrounding this controversy, the learned trial court was war-

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Statement of Case.

ranted in concluding that the smoke, soot, and fumes cast upon respondent's property was of such character as to become the direct cause of substantial discomfort and inconvenience to respondent's tenants and that it materially diminished the earning value of his property, and that respondent was entitled to the relief granted. *Joyce, Nuisances*, § 135; *McGill v. Pintsch Compressing Co.*, 140 Iowa 429, 118 N. W. 786, 20 L. R. A. (N. S.) 466. We have not lost sight of our holding in *DeKay v. North Yakima & Valley R. Co.*, 71 Wash. 648, 129 Pac. 574, but we do not regard our holding in that case as in conflict with our conclusions in this case.

We are of the opinion that the learned trial court correctly disposed of the cause, and, therefore, affirm the judgment.

MOUNT, GOSE, and CHADWICK, JJ., concur.

[No. 11060. Department One. July 19, 1913.]

M. O. CARTON *et al.*, *Respondents*, v. THE CITY OF SEATTLE,
Appellant.¹

EMINENT DOMAIN—AWARD — WRONGFUL DISTRIBUTION — LIABILITY. Where a city, after bringing in all the necessary parties and prosecuting condemnation proceedings strictly as required by law, paid the award to the parties adjudged entitled thereto, no appeal having been taken from the judgment, it is not liable to the true owners of the property even though payment was made to the wrong parties through inadvertence, fraud, or the failure of the parties to keep faith with one another.

Appeal from a judgment of the superior court for King county, Gay, J., entered November 8, 1912, upon findings in favor of petitioners for an award in a condemnation case. Reversed.

¹Reported in 133 Pac. 596.

James E. Bradford and William B. Allison, for appellant.

Carkeek, McDonald & Kapp, for respondents.

William L. Waters, in propria persona, defendant.

MOUNT, J.—This is a proceeding in a condemnation case wherein M. O. Carton and wife claim an interest in an award in condemnation, and seek to recover such interest from the city of Seattle, which condemned the property, and from certain other interested parties who have collected the award in condemnation. Upon a trial of the issues made in this proceeding, the trial court awarded the petitioners a judgment against the city of Seattle in the sum of \$1,665, and against certain other parties in the sum of \$232. The city only has appealed.

This is the second appeal upon substantially the same facts. When the case was here before, we said in *Carton v. Seattle*, 66 Wash. 447, 120 Pac. 111:

“This action is waged upon the theory that the city is liable to the plaintiffs for the misapplication of the fund, and the judgment of the trial judge was based principally, if not entirely, upon the theory that the mortgages had become merged in the legal title, and that no recovery could be had by the assignee thereof. We cannot agree with this theory, nor will we discuss it, for we find ample warrant in other principles of the law to sustain the judgment of the trial court. It is a maxim of the law that for every wrong there is a remedy; or, stating the principle the other way, there can be no remedy unless there be a wrong. A wrong consists in a trespass upon the right of another, or in the omission of a duty imposed by law. Applying this test, we cannot conceive how a right of action can be maintained against the city. There is no suggestion that it did not proceed in strict accord with the statute. It brought the property within the jurisdiction of the court; it made all interested therein parties, and upon the return of a verdict assessing damages, paid the fund into court, or, what is the same thing, made it available to those who had a lawful claim thereto. Beyond this, it was not required to go. The law puts no duty of segregation, or application of the funds once paid into the registry of the

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court, upon it, and if the court inadvertently, or as the result of fraud practiced upon it, omits the names of some of the proper parties from the verdict, or makes payment to the wrong party, it does not make the city liable beyond the terms of the statute, or deprive the parties claimant of any rights or obligations *inter sese*."

After further discussion of the case, we concluded by saying:

"The judgment of the lower court is therefore affirmed, without prejudice, however, to the plaintiff to invoke the general equity powers of the court in the original action as was done in the *Hess* case, or to take an assignment of the right which is in Rutherford and wife to bring a personal action for damages against those responsible for the present state of affairs."

Thereafter these petitioners commenced this action in the lower court, alleging, in substance, that certain property had been condemned; that city warrants had been issued in payment therefor in the sum of \$6,130.40 and in the sum of \$230.16; that the city had appropriated the real estate for public uses; that it had levied an assessment and collected funds which the city was holding in lieu of the property; that the city was holding in trust the sum of \$6,360.56; and that unless restrained by the court it would pay this sum of money to persons not entitled to receive the same; that the petitioners had an interest in the fund to the extent of one lot and a fraction. The petitioners further alleged that, if the city was not restrained, the fund in the possession of the city treasurer which was held in lieu of the land would be dissipated and lost; that the petitioners' mortgage and liens on the property in question would be lost and destroyed and be of no value; that petitioners had no plain, speedy or adequate remedy at law. There was a prayer for a restraining order against the city. A hearing was had on the show cause order, and the trial court denied the restraining order. Thereafter the city paid the warrants, which were held by W. D. Perkins & Company. Afterwards the action came on for trial before

the court without a jury. It appeared in this case that the city of Seattle, in July, 1908, commenced an action to condemn certain lots in the city of Seattle for street purposes. All the record owners and encumbrancers were made parties to that proceeding, which resulted finally in a judgment in favor of Mrs. P. A. Campbell in the sum of \$6,320.76. No appeal was taken from that judgment, and it became final. After the judgment had been entered, it was satisfied by Mrs. Campbell and she procured from the county clerk a transcript of the execution docket and presented the same to the city comptroller and demanded and received therefor a condemnation warrant for the amount of the judgment and costs. After the issuance of this warrant, it was sold and assigned to W. D. Perkins & Company. After sufficient money had been collected by the city and was in the hands of the city treasurer to pay this warrant, and after the restraining order in this proceeding had been denied, the city treasurer paid the warrant to W. D. Perkins & Company, the holders of the warrant. Upon the trial of this case, the trial judge evidently concluded that the city had wrongfully paid this money to W. D. Perkins & Company, after notice that these petitioners had a claim against the same, and therefore entered a judgment against the city for the sum of \$1,665, being the interest which these petitioners had in the property condemned by the city.

Whatever may be the rights of the parties interested in the property condemned, as between themselves, need not be here decided. We endeavored to make it plain in *Carton v. Seattle, supra*, that the city was not liable for the misapplication of the funds which had been brought within the jurisdiction of the court upon the condemnation proceeding. In that case we said:

“There is no suggestion that it did not proceed in strict accord with the statute. It brought the property within the jurisdiction of the court; it made all interested therein parties, and upon the return of a verdict assessing damages, paid the

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fund into court, or, what is the same thing, made it available to those who had a lawful claim thereto. Beyond this, it was not required to go."

The same is true in this case. The city did all that it was required to do. It brought the property within the jurisdiction of the court; it made all interested therein parties to the action, and upon the return of a verdict assessing the damages for the property taken, it paid the fund into court, or, what is the same thing, made it available to all the parties interested in it. All the parties interested in it finally consented that a judgment should go in the name of Mrs. P. A. Campbell. A judgment was so entered. No appeal was taken therefrom, or objection made thereto. Mrs. Campbell, through her authorized attorneys, satisfied the judgment and received the city's warrant therefor. She negotiated the warrant; and the city, after the money had been paid into the treasury for the purpose, paid the warrant. So far as the city is concerned, it followed the provisions of the law strictly, and lawfully paid the money to the holder of the warrant. The city did nothing unlawful in the matter. When it paid the award fixed by the court in condemnation to the parties adjudged entitled thereto, its liability ceased. The fact, if it be a fact, that some of the parties to the action did not keep faith with other parties, did not involve the city in any further liability. As we said in the other case:

"If the court inadvertently, or as the result of fraud practiced upon it, omits the names of some of the proper parties from the verdict, or makes payment to the wrong party, it does not make the city liable beyond the terms of the statute, or deprive the parties claimant of any rights or obligations *inter sese*."

It is plain, we think, that the trial court erred in granting a further judgment against the city. The judgment is therefore reversed, and the action dismissed as against the city.

CHADWICK, GOSE, and PARKER, JJ., concur.

[No. 11011. Department One. July 21, 1913.]

W. MARTIN CARR, *Respondent*, v. A. C. REMELE *et al.*,
Appellants.¹

VENUE—RESIDENCE OF DEFENDANT—DOMICILE. Under the rule that statutes should be liberally construed in favor of the jurisdiction where the suit is instituted, a defendant, sued in the county where domiciled and engaged in business at the time the cause of action arose, is not entitled to a change of venue under Rem. & Bal. Code, § 208, fixing the venue in the county of his residence, on a mere showing that, being a newcomer in the state, he intended to reside in another county, without ever having declared a residence or engaged in business therein.

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered September 7, 1912, upon findings in favor of the plaintiff, in an action in tort. Affirmed.

Curtiss & Remele, for appellants.

John M. Cannon, for respondent.

CHADWICK, J.—This action was begun in Adams county. Defendant Remele is confessedly a resident of Spokane county, and Robertson was employed by him as foreman on his ranch in Adams county. Defendants appeared and filed a motion for a change of venue. This motion was supported by their own affidavits, each claiming that he was and is a resident of Spokane county. This showing was met by counter affidavits. After a hearing and argument of counsel, the court denied the motion, holding that the defendant Robertson was a resident of Adams county.

We have read the affidavits and are satisfied that the court did not err in his judgment. It may be that Robertson was not a *bona fide* resident of Adams county with *animo manendi*. Neither is it shown to our satisfaction that he was a resident of Spokane county. There is no showing that he ever declared a residence in that county or that he was ever engaged

¹Reported in 133 Pac. 593.

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in any business there, or that he voted or participated in any way in the civic affairs of the county. His showing, taken at its best, indicates rather that he now intends to reside in Spokane. He came recently from Minnesota and Montana. At the time the cause of action arose, and at the time the suit was begun, he was domiciled in Adams county and was there engaged in business; and if he is to be credited with a residence in this state at all, we think that he was a resident of Adams county, within the meaning of the statute. If a defendant's affairs are in such a state that it cannot be certainly known in which county his residence is established, where his acts are to be measured against his mental reservations, the fact that his domicile and place of business activity is in the county where he is sued is an important if not controlling circumstance.

In doubtful cases, we think the statutes should be liberally construed in favor of the jurisdiction where the suit is instituted. One claiming the benefit of this statute,

"should be able to point to his residence, by facts so certain and notorious as to enable the plaintiff, by the use of ordinary diligence, certainly to know where to bring his suit. The fact of residence in a particular county ought not to be so uncertain and equivocal, nor ought the statute to be so strictly construed, as that the plaintiff shall be compelled, in a case rendered doubtful and uncertain by the conduct of the defendant, to decide rightly at his peril. Too great strictness of construction applied to a case like the present, might have the effect to defeat the suit in both counties, and place the plaintiff in the condition of the unfortunate suitor, who was refused admittance into both the court of law and chancery, because each thought the other the only proper forum to afford redress; or the plaintiff who was denied redress for an acknowledged injury, because, when he sued in case, the court thought he ought to have brought trespass; and when he brought trespass, the court thought his only remedy was case. Cases of this kind have often been instanced to illustrate the absurdity of maintaining the exclusive jurisdiction of courts of law and equity, and the distinctions of forms of action, which our law rejects. But if the statute in question

is to be so strictly construed as to endanger the defeat of the plaintiff's action in a case like the present, it might be justly chargeable with a similar abuse. It ought not to receive a construction which will prevent its object. . . . At all events, where, as in this case, he has had his residence in one county for a considerable time anterior to the bringing of the suit, that, for the purposes of the suit, ought to be held to be the place of his residence, until he has effected an actual and complete change of residence from that to another county. . . .” *Brown v. Boulden*, 18 Tex. 431.

See, also, *Pearson v. West*, 97 Tex. 238, 77 S. W. 944.

It is our judgment that defendant Robertson was properly sued in the superior court of Adams county. His status fixed the venue of the case. Rem. & Bal. Code, § 208 (P. C. 81 § 109).

Affirmed.

GOSE, PARKER, and MOUNT, JJ., concur.

[No. 11233. Department One. July 21, 1913.]

FRANK T. HOOVER *et al.*, Respondents, v. H. P. BOUFFLEUR
et al., Appellants.¹

MORTGAGES—ABSOLUTE DEED AND OPTION TO REPURCHASE—INTENT—EVIDENCE—SUFFICIENCY. The rule requiring clear and convincing evidence that an absolute deed and option to repurchase were intended as a mortgage and not a sale, does not require the intent to appear on the face of the papers; and a mortgage is sufficiently established where it appears that property worth \$4,000, subject to a balance of \$2,000 due on a mortgage, was deeded in consideration of \$250, most of which was applied on overdue installments on the mortgage, and only \$7.50 paid to the grantor, that an option to repurchase within 30 days upon payment of \$325, was given by the grantee, who made a studied effort to evade the effect of the usury laws, and there was a direct conflict in the testimony of the parties as to whether a loan or a sale was made.

Appeal from a judgment of the superior court for Spokane county, Miller, J., entered March 7, 1913, upon findings

¹Reported in 133 Pac. 602.

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in favor of the plaintiffs, in an action for equitable relief. Affirmed.

John C. Kleber, for appellants.

William S. Lewis, for respondents.

CHADWICK, J.—On the 9th day of February, 1912, plaintiffs were the owners of lot 10, in block 3, Richland Park addition to Spokane Falls. They had purchased the property sometime prior thereto for \$3,800, and had made improvements thereon of considerable value. The trial court found the property to be worth more than \$4,000 at that time. There was a mortgage for \$3,000 on the property. This mortgage was payable in installments of \$50 a month with interest. There was, at the time mentioned, three installments overdue on the mortgage, together with the interest, in all aggregating the sum of \$228.75. Plaintiffs did not have the money to meet these payments and they negotiated with one Heaton, who brought them in contact with defendant. The amount desired by plaintiffs was \$250. This, defendant agreed to advance, after looking at the property. Defendant testified—and he is supported by Heaton in this—that he refused to make a loan upon the property; that he told plaintiffs that he would buy the property, advance the \$250, and give them an option to repurchase within three months, upon payment of \$325. A deed was drawn and executed by the plaintiffs conveying the property to defendant subject to the unpaid balance of the mortgage; \$1,000, including the \$150 to be paid out of the loan or purchase price as the case may be, having been paid upon the mortgage hereinbefore referred to, leaving \$2,000 still due. An option to purchase was then executed by plaintiffs in the form following:

“Option to Purchase.

“Spokane, Wash., Feb. 9th, 1912.—191

“The undersigned hereby agrees to sell to Frank T. Hoover or wife of Spokane, Wash. within 30 days from date hereof, the following described property, to wit: Lot ten (10) in

Block three (3) of Richland Park addition to Spokane Falls, now Spokane, Washington. For the sum of Three hundred and twenty-five (\$325) Dollars to be paid to the undersigned by the said Frank T. Hoover or wife on or before 90 days from date hereof, and if not so paid then this option to be null and void. H. P. Bouffleur."

The \$250 was dispensed as follows: \$10 was paid to Heaton. Defendant testifies, and so does Heaton, that it was paid at the request of plaintiffs. Two hundred and thirty-two dollars and seventy-five cents was paid in the form of a check drawn in favor of the mortgagee, the parties assuming that amount to be the true amount of principal and interest due, and \$7.75 was paid to plaintiff Frank T. Hoover. Defendant testifies that these payments were all directed by the plaintiffs. The plaintiffs, on the other hand, insist that they applied for a loan to Heaton; that Heaton was at all times the agent of the defendant and that he arranged with defendant to make a loan of \$250; that defendant went to the home of plaintiffs and satisfied himself that the security was ample and that they thereafter went to his office and executed the deed and accepted the option. They say that nothing was said about rent for the place. Defendant explains this omission by saying that he thought it would be no more than fair to give them the rent for the three months or until the expiration of the option. The time having expired, and the plaintiffs having failed to repurchase the property, a notice to vacate was served upon them. Thereupon plaintiffs tendered to defendant the sum of \$90, that being the amount he would be entitled to recover under the usury statutes, Rem. & Bal. Code, § 6251 *et seq.* (P. C. 263 § 3), and demanded a deed. This was refused, and in consequence this case was brought, and from a judgment in favor of the plaintiffs, defendant has appealed.

Appellant relies upon certain well settled principles of the law. That is, that there is a certain integrity about a written instrument and especially a deed, and that to overcome its

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terms and import testimony must be clear, cogent and convincing. He cites, *Dempsey v. Dempsey*, 61 Wash. 632, 112 Pac. 755; *Debney v. Smith*, 38 Wash. 40, 80 Pac. 199; *Reynolds v. Reynolds*, 42 Wash. 107, 84 Pac. 579; *Johnson v. National Bank of Commerce*, 65 Wash. 261, 118 Pac. 21; *Washington Safe Deposit & Trust Co. v. Lietzow*, 59 Wash. 281, 109 Pac. 1021; *Swarm v. Boggs*, 12 Wash. 246, 40 Pac. 941; *Dignan v. Moore*, 8 Wash. 312, 36 Pac. 146; *Boyer v. Paine*, 60 Wash. 56, 110 Pac. 682; *Reed v. Parker*, 33 Wash. 107, 74 Pac. 61; *Conner v. Clapp*, 37 Wash. 299, 79 Pac. 929.

He also relies upon the rule that the mere option to purchase will not in itself make a deed a mortgage. *Johnson v. National Bank of Commerce*, 65 Wash. 261, 118 Pac. 21. These cases do not deny the right of the plaintiffs to recover in this action. A court of equity looks to the intent of a contract rather than to its form, and although the spoken words of the witness may be at variance with the actual conduct of the parties, they will not be accepted or permitted to overcome the true intent as it is gathered from the whole transaction. *Johnson v. National Bank of Commerce, supra*. Although appellant was careful to refrain from the use of the words "loan" and "mortgage," and to impress upon the plaintiffs that he was buying the property, it is our duty to go beyond his spoken words and review and consider every material circumstance. The fact that the property was worth at least \$4,000, and the amount paid by the defendant, or substantially all of it, was paid upon the mortgage thus reducing that encumbrance for the benefit of the defendant if a sale was indeed contemplated, when coupled with the option agreement or defeasance, are circumstances which in our judgment make it the imperative duty of a court of equity to declare the deed executed by respondents to be a mortgage. Otherwise we would be put to the stress of holding that respondents had sold a piece of property worth \$2,000 for a

cash payment of \$7.50 and three months rent. We think the case falls squarely within the rule declared in *Mears v. Strobach*, 12 Wash. 61, 40 Pac. 621:

"It is true that there was testimony to the effect that the plaintiffs [appellants] refused to make a loan and would only consent to advance the money upon an absolute conveyance to them of the property. But this testimony, interpreted in the light of the instruments actually executed, and of the other facts sufficiently proven by the evidence, fails to satisfy us that the transaction was not, after all, substantially one of lending and borrowing. In our opinion there was no intention on the part of either of the parties to do more than on the one part to secure the loan of the money and on the other to loan it and get proper security for its repayment with interest. This being so, the bare fact that they refused to loan the money and take a mortgage only tends to show that they thought they could evade the law, requiring the mortgage to be foreclosed before they could get possession of the property, by taking a deed, as they did, and giving a lease and option to purchase to the grantors named in the deed."

Appellant has emphasized that part of the opinion in the case of *Johnson v. National Bank of Commerce*, *supra*, wherein we said:

"We think the better rule is that where there is a deed absolute in form, either *with* or without a contemporaneous agreement for a resale of the property, *there being nothing upon the face of the collateral papers to show a contrary intent*, the presumption of law, independent of evidence, is that the transaction is what it appears to be, and that he who asserts the writing should be given a different construction, must show, by clear and convincing evidence, that a mortgage and not a sale with the right to repurchase was intended."

We may adopt this expression as a fair statement of the general rule, but it was not our intention to hold that the intent of the parties must necessarily appear upon the face of the collateral paper. To do so would kill that true spirit of equity with which a court should approach cases of this kind.

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Viewing the case at bar from all its angles and taking it by its four corners, we have no doubt that the transaction was conceived and carried out with purpose to evade the law designed to prevent the taking of usury. The record shows what seems to be a studied effort on the part of the defendant to bring himself within certain expressions of this court as he has gathered them from our written opinions. "That a deed regular in form is presumptive evidence of the highest character, that it voices the intention of the parties," that "evidence relied on to prove that a deed is in fact a mortgage must be clear, cogent and convincing;" that "the evidence must show that it was intended by both of the parties;" that "a deed will not be held to be a mortgage when it appears that the grantee had declined to make a loan upon the property;" and that "a deed will be held to be absolute where there is nothing upon the face of the collateral papers to show a contrary intent." All of these expressions will be found in the cases hereinbefore cited. The statements were pertinent at the time they were employed, but an examination of the cases will show that they were applied as governing rules where there was no such lack of consideration as would shock the conscience, or the case was so wanting in equity or the equities were so balanced as to compel us to look to the instruments alone for guidance. It is certain that we never intended to mark a path around the statutes designed to protect the necessitous borrower from the exactions of those who are disposed to take unlawful return for a loan or forbearance of money.

Affirmed.

GOSE, PARKER, and MOUNT, JJ., concur.

[No. 11056. Department One. July 21, 1913.]

SCHWABACHER BROTHERS & COMPANY, INCORPORATED,
Appellant, v. THOMAS F. MURPHINE, *Respondent*,
SAMUEL S. MURPHINE *et al.*, *Defendants*.¹

PRINCIPAL AND AGENT—SCOPE OF AGENCY—NOTICE TO AGENT. Notice of the retirement of a member of a firm, given to a collector, is outside the apparent scope of his employment and therefore not notice to his principal, where his authority was limited and special, he had no power to arrange terms or extend credit and was vested with no discretion.

Appeal from a judgment of the superior court for King county, Ronald, J., entered October 29, 1912, upon findings in favor of one of the defendants for costs, in an action on contract. Reversed.

J. W. Russell, for appellant.

Alderson & Murphine, for respondent.

Gose, J.—This is a suit upon an account for goods, wares and merchandise, alleged to have been sold to Samuel S. Murphine and Thomas F. Murphine, doing business as partners under the firm name and style of Murphine & Son. There was a judgment against the father for the amount claimed, and a judgment in favor of the son for costs. The plaintiff has appealed from the judgment in favor of the latter.

The court found that the copartnership was formed sometime in 1904; that it was continued until about the 25th day of April, 1910, when it was dissolved by the son retiring; that the father continued business under the name of Murphine & Son; and

“That shortly after the dissolution of the partnership and the sale of Thomas F. Murphine’s interest to his father, S. S. Murphine, S. S. Murphine notified Mr. Hood, who was

¹Reported in 133 Pac. 598.

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at that time a collector of Schwabacher Brothers & Company, the plaintiff in this case, of the dissolution of the firm, and of the retirement therefrom of Thomas F. Murphine, and that Mr. Wood, the credit man of Schwabacher Brothers & Company, never had any notice of the dissolution of the firm until February 29, 1912; that the only person connected with Schwabacher Brothers & Company who had notice of the dissolution was Mr. Hood, the collector, the duly authorized collector."

The indebtedness was incurred after the retirement of Thomas F. Murphine and between the 4th day of December, 1911, and the 1st day of March, 1912, including the latter date. The appellant had dealings with the firm of Murphine & Son from about the time it commenced to do business. The purchases were all made by means of the telephone. It is conceded that actual notice to the appellant of the retirement of Thomas F. Murphine was necessary to exempt him from liability.

The single question presented by the appeal is whether notice to Mr. Hood, the collector for the appellant, that Thomas F. Murphine had retired from the firm was notice to the appellant. The evidence shows that Hood was a collector without authority to arrange either the terms or the time of payment. He was invested with no discretion. His authority was limited and special. It follows that notice to him of the retirement of a member of the firm was not notice to his principal. The matter of extending credit was wholly outside of the scope of his duties. An agent is presumed to have such authority as inheres in the duties he is assigned to perform, and notice to him within the scope of his agency will be imputed to his principal, subject to exceptions not here present. *Moon Bros. Carriage Co. v. Devenish*, 42 Wash. 415, 85 Pac. 17; *Corbet v. Waller*, 27 Wash. 242, 67 Pac. 567; *Cowan v. Roberts*, 133 N. C. 629, 45 S. E. 954.

In the *Devenish* case, this court quoted with approval from

Trentor v. Pothen, 46 Minn. 298, 149 N. W. 129, 24 Am. St. 225, as follows:

"The rule which imputes to the principal the knowledge possessed by the agent applies only to cases where the knowledge is possessed by an agent within the scope of whose authority the subject matter lies. In other words, the knowledge or notice must come to an agent who has authority to deal in reference to those matters which the knowledge or notice affects. The facts of which the agent had notice must be within the scope of the agency so that it becomes his duty to act upon them or communicate them to his principal."

In *Cowan v. Roberts*, a retiring partner gave notice of his withdrawal from the firm at the plaintiff's office to a man whom he found working on the books. The notice was held to be insufficient, the court saying that it should have been given to the plaintiffs "or to some one of their employees who had charge of their credit department." Tested by these well established principles, the notice was clearly insufficient. The notice was designed to relieve Thomas F. Murphine from liability for the subsequent purchases of Murphine & Son. Hood, the collector, had no connection with either the sales or credit branch of the business. It appears that a small portion of the account was purchased on the 1st day of March, 1912, and that the appellant's assistant credit man had received notice the day previous of the retirement of Thomas F. Murphine. The latter is not liable for the amount of that sale.

The case will be remanded with directions to enter judgment against Thomas F. Murphine for the amount of appellant's account, less the sale on March 1st, 1912. The appellant will recover costs.

PARKER, MOUNT, and CHADWICK, JJ., concur.

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[No. 10999. Department Two. July 22, 1913.]

ANGIE C. KINNEAR, *Executrix etc., Appellants*, v. E. W. ROSS,
Commissioner of Public Lands etc. et al., Respondents.¹

PUBLIC LANDS—TIDE LANDS—PREFERENCE RIGHTS—AWARD—FINALITY—APPEAL. Under Laws 1895, p. 527, giving abutters the preference right to purchase tide lands if there are no conflicting applications, and providing that in case of conflict the board of state land commissioners shall order a hearing upon sworn statements and certify its order to the commissioner of public lands, abutters have no vested preference right by virtue of an order granting their applications, where it appears that such order was not final and was not certified to the commissioner because of conflicting applications, that the board retained jurisdiction, gave notice of the contest and required statements, which were not filed, and finally denied the applications for want of proof of ownership, upon which no appeal was taken as required by law.

SAME — PROCEEDINGS — WAIVER OF RIGHT — FAILURE TO APPEAL. Under Laws 1895, p. 527, upon the denial of the preference right of abutters to purchase tide lands, after a hearing before the board of state land commissioners, the remedy is by appeal to the superior court, failing which, the abutters must be held to have acquiesced in the final disposition of their applications.

SAME—PREFERENCE RIGHTS—LACHES. Abutters are estopped by laches to claim the preference right to purchase tide lands, where for more than ten years after their right accrued they failed to make any demand for a deed or tender the purchase price.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered September 9, 1912, upon findings in favor of the defendants, dismissing an action for equitable relief. Affirmed.

Charles A. Kinnear and Geo. B. Cole, for appellants.

The Attorney General and S. H. Kellerman, Assistant, for respondents.

FULLERTON, J.—This action was instituted by the appellants to enjoin the commissioner of public lands from selling,

¹Reported in 133 Pac. 607.

as property of the state, certain tide lands, known on the official plats of the state as block 411, Seattle tide lands. The commissioner of public lands took issue on the allegations of the complaint, and a trial was had thereon, which resulted in a dismissal of the action with prejudice.

The facts material to the inquiry in this court are not in dispute. On March 15, 1895, the board of state land commissioners of the state of Washington platted, with other lands, the tide lands here in question, and on that day filed such plat in the office of the commissioner of public lands, and in the office of the auditor of King county, the county in which the lands are situated; the appraised value of the block as shown on the plat being \$231. The predecessors in interest of the appellants claimed to own uplands abutting upon the tide lands, and to have a preference right to purchase the block in virtue of statute; and on April 25, 1895, filed with the commissioner of public lands an application to purchase the same. No proof of ownership of abutting uplands conferring on them the right to purchase was submitted by the applicants, nor was the upland which the applicants claimed to own, and upon which they based their claim of right to purchase, described in the application.

In the meantime, three other applicants, claiming a preference right to purchase the land in virtue of upland holdings, filed with the commissioner of public lands applications to purchase the same. These several applications were referred by the commissioner of public lands to the board of state land commissioners; and that body, after due notice to the applicants, heard their several contentions, and on June 30, 1896, entered in their minutes an order rejecting all applications except that of the predecessors in interest of the appellants and awarding to such predecessors the preference right to purchase the property. This order, however, was not certified to the commissioner of public lands. On December 17, 1896, the board reconsidered and reviewed this order, and made a second order in which it found that the appellants' prede-

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cessors were entitled to purchase only a portion of the block 11, and entered another order on their minutes in which it awarded to them only a part of such block, awarding the remainder to one A. C. Shaw, whose application had been rejected at the first hearing. This order likewise was not certified to the commissioner of public lands. On December 22, 1897, the board again reviewed its former orders at a hearing at which all of the applicants were again represented, those whose applications had formerly been rejected as well as the successful applicants. This order contains the following recital:

“In the hearing of the case it developed that each applicant based his right to purchase the tide lands in controversy upon the fact of his being the upland owner. The board thereupon ordered that the several applicants be ordered to furnish proof to the board of the ownership of the upland abutting the tide lands applied for by each, at the time said applications were filed. And it was further ordered that if such proof does not establish the fact of such ownership, the entire application shall stand rejected.”

Notice of this order was given the applicants, together with a notice to the effect that a further hearing would be had on January 26, 1898. At the last mentioned date, none of the applicants appeared or attempted to furnish the proofs required, except A. C. Shaw, who filed a certified copy of a deed to certain uplands as such proof.

On February 7, 1898, the board again reconsidered and reviewed all of its prior orders relative to the purchase of the block in question, and on that day entered an order reciting that the applicants had failed to furnish the board with proofs of their upland ownership necessary to entitle them to a preference right of purchase under the statute, and ordered that each and all of the applications stand rejected for that reason, and that the land be “thrown open to sale by public auction as provided in section 47 of the act relating to public lands of the state.” Notice in writing of this last order was served upon all of the applicants on February 11,

1898, the appellants' predecessors in interest as well as the others, together with a notice informing each of them that they had thirty days from the date thereof in which to appeal from the order. There was no appeal from the order, nor did the predecessors in interest of appellants tender the purchase price of the lands to the commissioner of public lands, or make any formal demand for a deed, within sixty days after notice was given them of the order rejecting their application. Indeed, no formal demand or tender was made until just prior to the institution of the present action, a period of more than ten years after the rejection of the application.

In September the land was reappraised (the appraisers finding the value thereof to be \$4,000) and offered for sale, whereupon the present action was instituted with the result above stated.

The appellants contend that their predecessors in interest acquired a vested right to the land in virtue of the original order of the board of state land commissioners purporting to award to them a preference right to purchase the lands; that all of the subsequent orders of such board are, in consequence, nullities; and that they have now, as the successors in interest of the persons in whose favor the order was made, a right to a deed from the state for such property on the payment of its then appraised value.

The statute in force when the application under which the appellants claim was filed, Laws 1895, p. 527, gave the owner of uplands abutting upon tide lands a preference right to apply for the purchase of such lands for sixty days following the filing of the final appraisal of the same with the commissioner of public lands, and provided that, if at the end of such sixty days there were no conflicting applications filed, the applicant should "be deemed to have the right of purchase." It further provided that, if at the end of such sixty days there were conflicting applications filed for the land, the board of state land commissioners should order a hearing,

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and should within a time stated order each applicant to submit under oath a full statement of the facts whereby he claims a preference right of purchase; which statement, it was further provided, should be the only pleading required, and should be deemed denied by the other applicants; that in case any applicant should fail within the time limited to file such statement, he should, unless good excuse be shown therefor, be deemed to have waived his right of purchase of the tract under his application, and that at the hearing the board should determine who has the first right of purchase, and should award the land to such applicant, and certify such award to the commissioner of public lands, who should thereafter proceed to sell and dispose of such lands in accordance therewith. It also further provided that, when the land should be finally awarded to an applicant, he must make his initial payment for the land within thirty days thereafter.

Tested by these statutes, it is plain that there was no final award of the lands here in question to the applicants. The order of the board of state land commissioners under which the appellants claim was not a final award. To make it final it was necessary that it be certified to the commissioner of public lands. The board did not so certify this order; on the contrary, it retained jurisdiction over the subject-matter and made further and different orders with respect thereto before it made such certification. The record, it is true, offers no direct explanation why the board did not certify to the commissioner of public lands its original order, but the reason is not far to seek. There were conflicting applications and the board had made the award without the pleadings and proofs required by the statute as a prerequisite to the determination of conflicting applications. It thought its order irregular and void, and retained jurisdiction over the cause that it might make a valid order in the premises. When, therefore, it retained jurisdiction and directed these proofs to be filed, and the applicants failed to comply therewith, it was justified in rejecting the applications and certifying the land

to the commissioner of public lands as lands not subject to a preference right of purchase.

Moreover, the right of the applicants to complete their purchase, if they were entitled at all to the right of purchase, arose when the order of the board was certified to the commissioner of public lands. The record is clear that these applicants had notice of this order and certification at the time it was made. Their remedy was to appeal to the courts from the order within the time and in the manner given them by statute; and failing to do so, they must be held to have acquiesced in the final disposition made of their application, even if we assume that the original order of the board was the only order the board had power to make.

Again, the appellants are estopped by their own laches from now asserting a preference right of purchase, or claiming under the original order. They did not, within a reasonable time, make a valid demand upon the board of land commissioners or the commissioner of public lands for a compliance with the order. A demand to be valid under such circumstances must be made within a reasonable time after the right accrued, it must be formal and be accompanied with a tender of the purchase price of the property. Here no such demand was made, and the record clearly shows that no tender of the purchase price to the state was made until more than ten years after the claimed right of purchase accrued.

The appellants cite and rely upon the case of *State ex rel. Billings v. Bridges*, 22 Wash. 64, 60 Pac. 60, 79 Am. St. 914, and *State ex rel. Wilson v. Grays Harbor & Puget Sound R. Co.*, 60 Wash. 32, 110 Pac. 676. But the rule of those cases does not aid the appellants. The applicants therein had complied with all of the requirements of the law necessary to the acquiring a right in the property, and appealed seasonably to the courts when their rights were not recognized. Here there was no such compliance in the first instance, and there was a delay of more than ten years between the time

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the right is claimed to have accrued and the attempt to enforce such right. These facts differentiate the cases.

The judgment appealed from is affirmed.

MAIN, MORRIS, and ELLIS, JJ., concur.

[No. 11055. Department Two. July 22, 1913.]

JOHN B. FOGARTY, *as Administrator etc., Respondent*, v.

NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*.¹

MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—APPORTIONMENT UNDER FEDERAL ACT—QUESTION FOR JURY. Under § 3 of the Federal employers' liability act, providing that contributory negligence is not a defense but that the damages are to be diminished by the jury in proportion to the negligence attributable to the employee, contributory negligence and the apportionment of damages are for the jury.

DEATH—RIGHT OF ACTION—FEDERAL ACT—DAMAGES RECOVERABLE—INSTRUCTION. In an action for wrongful death under the Federal employers' liability act limiting the recovery by dependent relatives to loss resulting from deprivation of reasonable expectancy of pecuniary benefits, it is error to instruct that the law has no fixed standard by which to ascertain the damages, and that the question to determine was what loss the plaintiffs suffered by reason of the death of the deceased, and that the deceased owed the "legal duty" to support his wife and child (whom he had deserted), and that they were entitled to recover independently of whether or not he contributed anything to their support.

SAME—DAMAGES—APPORTIONMENT. In an action under the Federal employers' liability act by a wife and child for the wrongful death of the husband and father, it is error to instruct the jury to assess damages in a single sum; since the recovery depends on the pecuniary loss suffered by each beneficiary.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered October 3, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

¹Reported in 133 Pac. 609.

Englehart & Rigg, for appellant.

William M. Thompson and *Henry J. Snively*, for respondent.

MORRIS, J.—This action was brought under the Federal employers' liability act on behalf of the widow and minor child to recover damages for the death of Frank E. Myers, caused by the derailment of an engine upon which the deceased was working as fireman.

The negligence charged was in failing to cause a switch to be properly set and closed, and maintaining it in an open and defective condition.

Several defenses were pleaded, none of which need be referred to except two. The first of these is contributory negligence. All that need be said in regard to this charge is that, under section 3 of the act, contributory negligence is not a bar to recovery, but the damages are to be diminished by the jury in proportion to the amount of negligence attributable to the employee. It will thus be seen that, in cases under this act, it becomes a question of fact for a jury to apportion the negligence of the employer and the employee, and to render a verdict in such an amount as they shall fairly determine to represent the true apportionment. The cases must, therefore, be rare in which the court would be justified in saying, as a matter of law, that the contributory negligence of the employee so far exceeds the negligence of the employer that the jury would not be justified in returning a verdict in any amount. Whether or not such a rule should be adopted need not here be discussed, as the facts upon which the charge of contributory negligence is here based are so plainly for the determination of the jury that it would be a judicial usurpation of power to interfere with the verdict.

The next defense to be noted is that, long prior to the death of deceased, the deceased and his wife had abandoned each other and had not lived together as husband and wife.

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It was also charged in this connection that the deceased had also abandoned the minor child, who is now about seven years of age, and had not contributed to the support of this child for many years, and that neither the widow nor the child was to any extent dependent upon the deceased for support. The jury returned a verdict assessing the damages in a lump sum at \$20,000, which the lower court reduced to \$12,500, and the company appeals.

In submitting this defense to the jury, we think the lower court committed error. The jury were instructed that, in cases of this character, the law has no fixed standard by which to ascertain and fix the damages, and that the question for them to determine was, what loss did the wife and child suffer by reason of the death of the deceased. The jury were further told that the damages should be assessed in a single sum for the benefit of the surviving widow and child.

Whatever may be the rule as to the correctness of these instructions in an ordinary action for wrongful death under the statutes of this state, they were not correct as applied to a cause of action founded upon the Federal employers' liability act. Under this act, as interpreted by the supreme court of the United States, a new and distinct right of action is given for the benefit of the dependent relatives named in the statute, and the damages recoverable are limited to such loss as results because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee. The damage is limited strictly to the financial loss sustained. If there is no reasonable expectation of pecuniary benefits, or no financial loss sustained, then there can be no recovery under this act. The court below went beyond this limitation in charging the jury that, in cases of this character, the law has no fixed standard by which to ascertain the loss and that the sole question for them to determine was what loss did the wife and child suffer. The law does fix a standard, and that standard or measure is the financial benefit which might reasonably be expected in a

pecuniary way, and the question for the jury to determine was not what general loss, but what pecuniary loss did the wife and child sustain. In speaking of the damages or loss recoverable under this act, the supreme court of the United States, in *Michigan Central R. Co. v. Vreeland*, 33 Sup. Ct. 192, says:

“The damages are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries. The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. This is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived.”

Another instruction was:

“You are instructed that it was the legal duty of the deceased in his lifetime to care for and support his wife and child, even though he lived separate and apart from them, or they lived separate and apart from him, and this duty could not be avoided by him by any voluntary act on his part, and a wife and child have the right to recover damages for the death of the husband and father caused by the negligence of another independent of whether he has contributed anything to their support.”

This we think was erroneous, in that it fixes “legal duty” independent of pecuniary benefits as a measure by which the jury should estimate the damages instead of the pecuniary benefits which the wife and child might have reasonably received during the lifetime of the deceased. This same interpretation of the character of the loss recoverable under this act is also made in *American R. Co. v. Didricksen*, 33 Sup. Ct. 224, where it is held that the damages recoverable are limited to the loss sustained by the deprivation of a reasonable expectation of pecuniary benefits and the financial loss sustained.

It was also error to direct the jury to assess the damages in a single sum. The jury might have found, as between the widow and child, that they did not sustain an equal financial

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loss, or they might have found that one sustained such a loss while the other did not; yet, under the instructions, to assess the damages in a single sum, there was no way to indicate the determination of the jury as to the pecuniary loss suffered by each claimed beneficiary. This question in cases under this act has lately been reviewed by the supreme court of the United States in *Gulf, Colorado & S. F. R. Co. v. McGinnis*, 33 Sup. Ct. 426, where it said:

“The statutory action of an administrator is not for the equal benefit of each of the surviving relatives for whose benefit the suit was brought. Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss. That apportionment is for the jury to return. This will, of course, exclude any recovery in behalf of such as show no pecuniary loss.”

For these reasons, the judgment is reversed, and the cause remanded for a new trial.

MAIN, FULLERTON, and ELLIS, JJ., concur.

[No. 11032. Department Two. July 22, 1913.]

STEWART & HOLMES DRUG COMPANY, *Appellant*, v. J. W. REED, *Respondent*, J. G. ROSS, *Defendant*.¹

SALES—CONDITIONAL SALES—RETAKING PROPERTY—EVIDENCE—SUFFICIENCY. Findings that the vendor of a soda fountain under a conditional sales contract had elected to retake the same and cancel the debt, are sustained where it appears that shortly after the vendee had sold out his business to a third party, the vendor attempted to sell it to such third party, and made arrangements to have it boxed up and shipped back, and delayed for some time making claim upon such third party for its price as a garnishee under the sales-in-bulk act, until the garnishee had paid up the vendee in full.

SAME—RETAKING PROPERTY—ELECTION. An election by the vendor to retake property conditionally sold, finally precludes the assertion

¹Reported in 133 Pac. 577.

of remedies under the contract; and the election may be invoked by a third person in defense of the assertion of such remedies against him.

FRAUDULENT CONVEYANCES—SALES-IN-BULK—CREDITORS—CONDITIONAL VENDORS—NOTICE. The vendor in a conditional sales contract, who has not elected to retake the property and cancel the debt, is protected as a creditor under the sales-in-bulk act where his vendee makes a sale of goods in bulk without complying with the act, and it is not necessary that he give notice to the fraudulent vendee that he intends to rely upon the statute.

Appeal from a judgment of the superior court for San Juan county, Joiner, J., entered January 8, 1913, dismissing a garnishee defendant, after a trial to the court. Reversed in part.

Leopold M. Stern (*J. W. Russell*, of counsel), for appellant.

Louis T. Silvain (*H. B. Butler*, of counsel), for respondent.

ELLIS, J.—In this action, the plaintiff, by garnishment, sought to enforce against the garnishee defendant Reed an alleged liability under the sales-in-bulk law. About June 17, 1911, the defendant Ross, who was conducting a small mercantile business at Friday Harbor, San Juan county, purchased from the plaintiff upon a conditional sale contract a soda fountain, at an agreed price of \$250. Twenty-five dollars was paid on the purchase price at the time, and \$25 was remitted from the purchase price by reason of a subsequent failure of the fountain to give satisfactory service, thus leaving a balance of \$200 which Ross never paid. Apparently, at the time of the purchase, Ross also purchased from the plaintiff supplies for the fountain of the value of \$28.50. This, also, was unpaid.

On the 18th day of July, 1911, the defendant Ross sold his entire stock and a part of his fixtures to the garnishee defendant Reed for \$510.79, \$50 of which was paid on July 20, 1911, \$160.79 on July 28, 1911, and \$300 on August 28, 1911. The soda fountain was not included in this sale. It is

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admitted that Reed did not obtain from Ross a verified statement of his indebtedness, and the names of his creditors, as required by the sales-in-bulk law, Rem. & Bal. Code, § 5296 *et seq.* (P. C. 203 § 9). On the 5th day of October, 1911, the plaintiff began an action against the defendant Ross to recover the amount of the unpaid balance of the purchase price of the soda fountain and the account of \$28.50 for supplies therefor. A writ of attachment was sued out, and the return of the sheriff on the summons, complaint, and writ of attachment shows that Ross could not be found. The plaintiff filed an affidavit for garnishment, alleging that the garnishee defendant was indebted to Ross and had in his possession and under his control personal property belonging to Ross. A writ of garnishment was issued against Reed, who answered denying any indebtedness to Ross and alleging that he had no property in his possession belonging to Ross. The plaintiff by affidavit controverted this answer. The defendant Ross was served with summons by publication. He failed to answer and an order of default was taken against him. Thereafter, on January 8, 1913, the issues presented in the garnishment proceeding were tried, and the court adjudged that the garnishee defendant, at the time of the service of the writ of garnishment, was not indebted to the defendant Ross in any sum, and then had in his possession no property belonging to Ross, and discharged the garnishee defendant, awarding him costs and disbursements, together with an attorney's fee of \$25. The plaintiff has appealed.

Both sides concur in the assertion: "The only question involved is whether or not the court erred in finding that appellant elected to and did rescind the conditional sale contract and retake the property prior to the commencement of the action against the defendant Ross." On this issue the respondent holds the affirmative, the appellant the negative. The evidence in support of the affirmative view may be condensed as follows: Shortly after making the purchase of the stock, the respondent wrote two letters to the appel-

lant, the last apparently written on August 9, 1911. These letters are not in evidence, but the appellant's answer seems to indicate that they advised the appellant of the sale and that the respondent had not purchased the soda fountain. The appellant's answer was as follows:

"J. W. Reed, Seattle, Wash., Aug. 10, 1911.

"Friday Harbor, Wash.

"Dear Sir: We are in receipt of yours of the 9th inst. and note contents. The fountain was sold to Mr. Ross and will have to be paid for by him. We do not know you in the transaction, and therefore have no desire to continue a lengthy correspondence. If Mr. Ross is good for the fountain, he will have to pay for it.

"Our Mr. Mayrand will probably be in Friday Harbor within a very short time and we will ask him to go into the matter more fully and take whatever action is necessary.

"Very truly yours, Stewart & Holmes Drug Co."

The respondent testified that thereafter, and in the month of August, the exact date did not appear, the man Mayrand, referred to in this letter, or Marens as he is called in the testimony, did go to Friday harbor and attempted to sell the soda fountain to the respondent. Twice subsequently—the dates do not appear—he visited Friday Harbor and each time tried to sell the fountain to the respondent. This is not contradicted. Marens was not called as a witness. One Woods, another representative of the appellant, testified that, in September, 1911, he went to Friday Harbor and that at that time the respondent had removed the fountain to a back room; and, although he testified that the respondent was using the fountain, the respondent denied this, and Woods' testimony shows that the only use was of the marble counter, and that there was no use being made of the fountain as such. Though Woods was, at that time, told that Ross had gone to California, there is no evidence that he then made any claim that the respondent would be held for the purchase price of the fountain. The evidence also shows that, at some time, the appellant, through its representative, Marens,

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made arrangements with one Little to have the fountain boxed up and returned to the appellant at Seattle. Little testified that he was spoken to several times with reference to this matter, the last time being about three months before the trial. We think this evidence justified the finding that the appellant elected to retake the fountain.

The law is well settled that where, as in this state, the title retained by the seller on a conditional sale is an absolute title, on breach of the conditional sale contract by the buyer, the seller has a choice of remedies. He may either disaffirm the contract and retake the chattel, or he may treat the transaction as an absolute sale and sue on the contract for the purchase price. But since these remedies are inconsistent, he cannot do both. The assertion of the one is an abandonment of the other. *Winton Motor Carriage Co. v. Broadway Automobile Co.*, 65 Wash. 650, 118 Pac. 817, 37 L. R. A. (N. S.) 71; *Ramey v. Smith*, 56 Wash. 604, 106 Pac. 160; *Keystone Mfg. Co. v. Cassellius*, 74 Minn. 115, 76 N. W. 1028; *Cooper v. Payne*, 111 App. Div. 785, 97 N. Y. Supp. 863; *White v. Gray's Sons*, 96 App. Div. 154, 89 N. Y. Supp. 481.

Such an election once made is final and irrevocable.

"Upon the breach of a conditional bill of sale, the vendor may either disaffirm the sale and retake the chattel, or ratify the sale and sue upon the contract. These remedies are inconsistent, and where an election is made it is final, and cannot be reconsidered." *Pels & Co. v. Oltarsh Iron Works*, 129 N. Y. Supp. 371, 372.

See, also, *Laclede Power Co. v. Assigned Estate of Ennis Stationery Co.*, 79 Mo. App. 302.

Such an election may be invoked by a third person as a defense to the attempted assertion of the alternative remedy against him. *Frisch v. Wells*, 200 Mass. 429, 86 N. E. 775, 23 L. R. A. (N. S.) 144. The appellant seemingly concedes that this is the law, but relies upon the rule as to election of remedy generally, as stated in 15 Cyc. 260:

“Although acts prior to the actual commencement of legal proceedings indicate an intention to rely upon one remedial right, yet they do not constitute an election which will preclude the subsequent prosecution of an action or suit based upon an inconsistent remedial right, unless the acts contain the elements of estoppel *in pais*.”

It may well be doubted that any element of estoppel is necessary where, as here, the retaking of the chattel sold on conditional sale actually cancels the debt. But assuming, without deciding, that this states the correct doctrine as to election in such a case, we think that the foregoing evidence not only shows an election on the appellant's part to retake the soda fountain with knowledge of the fact that the respondent had purchased the stock of goods, but also that the election was accompanied with the necessary element of estoppel *in pais*. The appellant's letter of August 10th was evidently written with knowledge of the fact that the respondent had purchased the stock of goods. At that time it is certain the respondent had not paid the last \$300 of the purchase price of the stock of goods to Ross and was then in position to protect himself. It is fairly deducible, also, from the evidence that the first visit of the appellant's representative, Marens, to Friday Harbor and his first attempt to sell the soda fountain to the respondent was also before the respondent had paid the last \$300 on the purchase price of the stock of goods. The letter of August 10th indicated that the appellant's representative would visit the respondent in a very short time and the respondent testified that the first visit took place in August. We think, in view of the fact that the appellant had more than a month after the respondent's purchase of the stock of goods before the respondent had paid the last installment of the purchase price thereon in which to have notified the respondent in case it intended to attempt to hold him for the purchase price of the fountain, and that both by letter and by the attempt to sell him the fountain, the contrary intention was made to appear,

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the appellant should now be estopped to claim as against the respondent that it did not elect to retake the fountain. While the letter above quoted indicates an intention to hold Ross for the purchase price, it also fails to indicate any intention to hold the respondent. The subsequent offer to sell him the fountain could only be interpreted by him as an election on the appellant's part to assert its title to the fountain under the conditional sale contract.

We do not want to be understood as holding that, in the absence of an election, the appellant would have been under any obligation to notify the respondent of its intention to assert its rights under the sales-in-bulk law in order to avoid an estoppel. Such a holding would shift the duty imposed by the statute upon the purchaser to the creditor. In the absence of an election, it was not incumbent upon the appellant to notify the respondent of its intention to rely upon the protection accorded by the statute, but having written to the respondent indicating that it relied solely upon the defendant Ross for payment, and afterwards having attempted to sell the fountain to the respondent, the facts showing estoppel become important, not primarily as an estoppel to rely upon the statute, but as an estoppel to deny the election.

It has been suggested that, in a case such as this, the election by the vendor under the conditional sale to treat the sale as absolute so as to create an existing debt should be made before the sale of the goods in bulk in order to hold the vendee of the goods under the sales-in-bulk law. This is on the theory that, until such election, the vendor under the conditional sale contract is not a creditor in the full sense of the term, and that the purchaser of the goods in bulk without taking the affidavit takes subject only to then existing debts. The statute, however, in its effect as declaring transfers fraudulent in law when the affidavit is not taken, is analogous in principle to the statute (Rem. & Bal. Code, § 8766; P. C. 95 § 47), relative to voluntary conveyances between

husband and wife. We have held the latter statute applicable to protect a creditor whose claim was immature and contingent. *Sallaske v. Fletcher*, 73 Wash. 593, 132 Pac. 648. In the absence of any prior election, the same rule should apply to creditors claiming protection under the sales-in-bulk law. It is obvious, however, that if an election to retake the chattel is made, whether before or after the sale of the goods in bulk, it cancels the debt and is a complete defense to the proceeding under the sales-in-bulk law to collect the price of the chattel.

The foregoing has no application to the item of \$28.50. That debt was never canceled. The failure to give judgment for that claim was error.

The judgment is reversed, with direction to enter judgment in favor of the appellant and against the respondent for \$28.50 with interest at the legal rate from June 17, 1911.

Neither party will recover costs.

MAIN and MORRIS, JJ., concur.

FULLERTON, J., concurs in the result.

[No. 11071. Department One. July 22, 1913.]

D. H. LEE, *Appellant*, v. CLARENCE D. HILLMAN *et al.*,
Respondents.¹

USURY—REMEDIES OF BORROWER—RECOVERY OF USURY PAID. The common law right to recover usurious interest paid in excess of the rate allowed by law is not abrogated by our usury laws, Rem. & Bal. Code, §§ 6251, 6255, prohibiting the taking of interest in excess of twelve per cent per annum, and providing that if a greater rate of interest be contracted for, the contract shall not be void, but in any action on the contract the plaintiff shall recover only the principal less twice the amount of interest paid, and less the amount of all accrued and unpaid interest.

¹Reported in 133 Pac. 583.

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Appeal from a judgment of the superior court for King county, Gilliam, J., entered November 7, 1912, dismissing an action for usurious interest paid, upon sustaining a demurrer to the complaint. Reversed.

J. E. McGrew and *C. A. Norton*, for appellant.

L. E. Kirkpatrick and *Raymond G. Wright*, for respondents.

PARKER, J.—The plaintiff seeks recovery from the defendants of the value of certain property which he claims to have surrendered to them in payment of usurious interest upon loans made by them to him. The defendants demurred to the plaintiff's complaint upon the sole ground that it failed to state a cause of action. The demurrer was sustained by the superior court, and the plaintiff electing not to plead further, judgment of dismissal was entered accordingly, from which he has appealed.

The argument of counsel upon both sides of the cause proceeds upon the assumption that the only question here involved is, Does the law recognize the right of one who has paid usurious interest to maintain a civil action as plaintiff to recover any portion of the amount so paid, or does it withhold from him all remedy except that which our statute gives by way of defense in an action brought to recover the principal upon which he has paid such usurious interest? The learned trial court sustained the demurrer to appellant's complaint evidently upon the theory that, our usury statute having provided a remedy to be interposed by way of defense on the part of the debtor, such remedy is exclusive. The sections of Rem. & Bal. Code relied upon by counsel for respondents as sustaining this view provide as follows:

"6251. Any rate of interest not exceeding twelve (12) per centum per annum agreed to in writing by the parties to the contract, shall be legal, and no person shall directly or indirectly take or receive in money, goods or thing in action, or in any other way, any greater interest, sum or

value for the loan or forbearance of any money, goods or thing in action than twelve (12) per centum per annum." (P. C. 263 § 3.)

"6255. If a greater rate of interest than is hereinbefore allowed shall be contracted for or received or reserved, the contract shall not, therefore, be void; but if in any action on such contract proof be made that greater rate of interest has been directly or indirectly contracted for or taken or reserved, the plaintiff shall only recover the principal, less the amount of interest accruing thereon at the rate contracted for, and the defendant shall recover costs; and if interest shall have been paid, judgment shall be for the principal less twice the amount of the interest paid, and less the amount of all accrued and unpaid interest." (P. C. 263 § 13.)

The decisions of the courts are, at least seemingly, in serious conflict as to the right of one who has paid usurious interest to recover the same by civil action as plaintiff, especially under usury statutes which prescribe a remedy by way of defense to an action prosecuted against the debtor to enforce collection of the principal. This seeming conflict, we think, however, will to a considerable extent be found to result from the varying language of the statutes of the several states, when the decisions are critically read. Our statute contains no express provision relating to the right of the payer of usurious interest to maintain such an action, and it is worthy of note that Rem. & Bal. Code, § 6295 (P. C. 267 § 35), gives to such payer the right, by way of defense in the nature of set-off against the principal, not only to have deduction made from the principal of the amount of interest so paid, but also an additional amount equal to the interest so paid, as a penalty. Thus the statute gives a right and a remedy which is farther reaching in effect than the payer would have under any circumstances in the absence of such provision; for whatever right or remedy under the common law or in equity he has would, of course, not go to the extent of enabling him to recover more than the amount of usurious interest so paid by him; that is, the

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right to the penalty awarded to him by this section must, of necessity, find its support in the statute alone. There is but little difficulty in seeing that the prescribed remedy by which the payer is to obtain the benefit of this penalty should be held exclusive, for that is something which is not given to him as a matter of common right, but because the legislative power conceives it to be a wise public policy, looking to the discouragement of usurious interest exactions; while it is manifest that his right to recover the actual amount of usurious interest paid by him, which by the express terms of Rem. & Bal. Code, § 6251 (P. C. 263 § 3), above quoted, would be unlawfully taken from him, may be rested upon that common right possessed by the citizen under the common law and in equity to have restored to him that which has been wrongfully taken from him. In the text of 22 Ency. of Plead. & Prac., at page 482, it is said:

“By the weight of authority the common-law remedy of assumpsit to recover back payments of usury is not abrogated by statutes providing other remedies for the recovery of such payments or for the recovery of penalties and forfeitures; but in some of the states there are decisions to the contrary.”

In the case of *Baum v. Thoms*, 150 Ind. 378, 50 N. E. 357, 65 Am. St. 368, in an exhaustive review of this question under a statute not unlike ours, at pages 381, 382, 387, the court said:

“It is next insisted that while usurious interest voluntarily paid may, under section 7046, Burns’ R. S. 1894 (5201, Horner’s R. S. 1897), be recouped by the debtor in an action on the contract affected by such usury, the same cannot be recovered back in a direct action, and that, therefore, the finding and judgment against appellants for usurious interest paid by appellee was contrary to law.

“Whatever the rule may be in other states it has been uniformly held in this jurisdiction that usurious interest could at common law be recovered back in an action brought for that purpose. *Lacy v. Brown*, 67 Ind. 478, and cases cited. *Musselman v. McElhenny*, 23 Ind. 4, 6, 85 Am. Dec. 445; *Wood v. Kennedy*, 19 Ind. 68; *Smead v. Green*, 5 Ind. 308,

309; *Berry v. Makepeace*, 3 Ind. 154; *State Bank v. Engsminger*, 7 Blackf. 105, 107, and cases cited. See note to *Crawford v. Harvey*, 1 Blackf. (2d ed.), p. 382. See, also, *Palmer v. Lord*, 6 Johns Ch. 95, 100-106; *Wheaton v. Hibbard*, 20 Johns 290, 292, 293, 11 Am. Dec. 284; *Nichols v. Bellows*, 22 Vt. 581, 54 Am. Dec. 85, and note; *Bexar etc. Association v. Robinson*, 78 Tex. 163, 22 Am. St. 36, and note p. 41; *Zeigler v. Scott*, 10 Ga. 389, 54 Am. Dec. 395, and note pp. 400-402; 27 Am. and Eng. Ency. of Law, 959, and cases cited in notes 3 and 4.

"The rule is that the borrower who has paid more than the legal rate of interest is not confined to the remedy given by statute, but may maintain assumpsit at common law to recover back the excess of interest paid, on paying or offering to pay the money lent with lawful interest. . . .

"It is true that section 4 of the act of 1879, being section 7046, Burns' R. S. 1894 (5201, Horner's R. S. 1897), provides that 'When a greater rate of interest than is hereby allowed (eight per cent.) shall be contracted for, the contract shall be void as to the usurious interest contracted for; and in an action on such contract, if it appear that interest at a higher rate than eight per cent. has been directly or indirectly contracted for, the excess of interest over six per cent, shall be deemed usurious and illegal, and in an action on a contract affected by such usury, the excess over the legal interest may be recouped by the debtor, whenever it has been reserved or paid before the bringing of the suit.' But as we have shown, the borrower is not confined to the remedy given by statute, but may resort to the remedy given by the common law. *State Bank v. Ensminger*, *supra*; *Smead v. Green*, *supra*; *Lacy v. Brown*, *supra*; *Palmer v. Lord*, *supra*; *Wheaton v. Hibbard*, *supra*.

"The payment of usurious interest is not a voluntary payment in such sense as to entitle the receiver to retain the amount paid above legal interest, but such payment is regarded as under the constraint of a formal, though illegal contract, obtained by taking advantage of the necessities of the borrower, and therefore excepted from the ordinary rule that one voluntarily paying money on an illegal claim cannot maintain an action to recover such payment. *Wheaton v. Hibbard*, *supra*; *Schroepel v. Corning*, 5 Denio 236; *Peterborough Savings Bank v. Hodgdon*, 62 N. H. 300; *Willie v.*

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Green, 2 N. H. 333; *Caughman v. Drafts*, 1 Rich. Eq. 414; *Fay v. Lovejoy*, 20 Wis. 403; *Wood v. Lath*, 13 Wis. 84; *First National Bank of Milwaukee v. Plankinton*, 27 Wis. 177, 9 Am. Rep. 453; *Grow v. Albee*, 19 Vt. 540; *Williams v. Wilder*, 37 Vt. 613; *Scott v. Leary*, 34 Md. 389; *Philanthropic Building Assn. v. McKnight*, 35 Pa. St. 470; *Thomas v. Shoemaker*, 6 W. & S. (Pa.) 179-183. Note to *Ziegler v. Scott*, 54 Am. Dec. 400-402. Note to *Bexar etc. Association v. Robinson*, 22 Am. St. 41. Note to *Davis v. Garr*, 55 Am. Dec. 398-400; 2 Ency. Plead. and Prac., pp. 1019, 1020, and note on usury.

"It follows, therefore, that in the absence of a statute expressly prohibiting it, usurious interest, which has been paid by a debtor, may be recovered in a direct action, or in any action brought by the person receiving such usurious interest, on a contract express or implied against such debtor. Since the repeal of the amending act of 1865, *supra*, by the act of 1879, *supra*, there has been no statute in this state prohibiting the recovery of usurious interest paid by a debtor."

The statutory remedy there available was similar to ours, though it did not provide for the deduction from the principal of any sum in addition to the usurious interest paid, as a penalty. In the early case of *Wood v. Lake*, 13 Wis. 94, 106, decided by the supreme court of that state in 1860, that learned court made pertinent observations along similar lines, as follows:

"There is another question raised upon this portion of the answer, which was argued at the bar, and which we are called upon to determine. By the law as it stood when the note and mortgage upon which this suit is brought, were executed, the taking or agreeing to take illegal interest did not render the contract void. It was good to secure the repayment of the principal sum loaned, but no interest whatever could be recovered upon it. Chapter 55, Laws of 1856. The answer alleges the payment by the defendant to the plaintiff, of the sum of \$60, as interest upon the sum of money mentioned in and secured by the note and mortgage, over and above the highest rate fixed by law; and in addition to setting up such usurious agreement and the payment of the extra interest in pursuance thereof, as a general defense to the action, or for

the purpose of preventing a recovery of anything more than the sum of money actually loaned, the defendant insists that the \$60 shall be allowed to him and deducted from the amount of the principal sum loaned, by way of set-off or counter-claim, and that the plaintiff is only entitled to a judgment for the balance which shall remain after such deduction. After a full examination of the authorities on the subject, we are of the opinion that the position of the defendant's counsel is correct, and that if final judgment should be rendered upon the demurrer, or if upon a trial of the merits, it should be found that the allegations of the answer are true in this respect, the deduction should be made, and that the plaintiff's measure of damages would be the residue of the principal sum loaned, after the money thus paid has been taken out. A remarkable unanimity of opinion upon this question seems to have prevailed among the courts of Great Britain and those of the several states of the Union where laws against usury, properly so called, have existed. It has been universally held, where statutes forbid the taking of excessive interest, and punish a violation of their provisions by the infliction of fines, penalties or forfeitures upon the person who takes it, that the person who pays the same may, independently of the remedies afforded by the statutes, maintain an action for money had and received, at the common law, to recover back the money so paid. In such cases, both parties are not understood to be *in pari delicto*, so as to preclude a recovery by either. Upon this subject, Mr. Comyn, in his Law of Usury, page 211, says: 'And with regard to parties becoming *participes criminis*, the following distinction is laid down, viz.: Between the prohibition of statutes made to protect the weak or necessitous from being overreached or oppressed, and the prohibitions of statutes enacted upon general reasons of policy and public expediency; in the latter case, all parties are equally criminal; in the former the oppressor is alone within the pale of the law.' The penalties of the law are all aimed at the lender and none at the borrower; and it appears to be clearly within the intent and meaning of the legislature, if not their words, that he shall not be permitted to retain or profit by money or property thus unlawfully acquired. The provisions of the law of this state (sec. 3, chap. 172, Laws of 1851), by which every person paying a greater sum for the loan or forbearance of money than that allowed by law,

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might, if his action was brought within one year after such payment, recover treble the sum so paid, confirms this view. It shows that the legislature did not intend that the receiver should retain the money thus obtained, and that they did not consider both parties equally at fault. Otherwise they would not have permitted the borrower to recover back three times the amount and thus speculate out of the attempted extortions of the lender. But if the borrower chooses, by not bringing his action within one year, to waive his right to a treble recovery, he may do so and still retain the right to maintain an action for money had and received, to recover back the excess actually paid, at any time within the period prescribed by the statutes of limitations. For the remedy given by the statute is cumulative and not exclusive, as has frequently been decided in other states where similar statutory remedies have been given."

In that case, it is true, the interest was sought to be recovered by way of set-off or counterclaim. It, notwithstanding, involved in part the recovery of interest actually paid, and the court apparently viewed it in that light. The following authorities also lend support to these views, having reference to remedies in addition to the prescribed statutory remedy as well as the right to recover in the absence of any prescribed statutory remedy: *Porter v. Mount*, 41 Barb. 561; *Threadgill v. Timberlake*, 2 Head 395 (39 Tenn. 223); *Vandergrif v. Swinney*, 158 Mo. 527, 59 S. W. 71, 81 Am. St. 325.

This view of the right to recover is opposed by other decisions, of which probably that of *Blain v. Willson*, 32 Neb. 302, 49 N. W. 224, may be regarded as the leading case. We are of the opinion, however, that the better rule is that adhered to by the authorities we have noticed. In 39 Cyc. 1030, numerous authorities are collected bearing upon the question.

Counsel for respondent remind us that usury is condemned by statute law only, and that, in the absence of statute making unlawful the charging and receiving of interest above a given rate, it would be lawful to contract for any rate. It

may be conceded that this is a correct view of the law as at present existing in this country. 39 Cyc. 890. Counsel for respondent argue that it must necessarily follow that there can be no such thing as a common law right to recover usurious interest paid by the debtor. It may be conceded that there is a sense in which there is no such *right* in the absence of statute, since whatever right the debtor has must necessarily rest primarily upon the statute which makes the exaction of such payment from him unlawful. We think, however, that it does not follow that the debtor who has been thus unlawfully deprived of money or property may not recover such money or property by a common law *remedy*, and that, of course, under our system means by the ordinary civil action which we have substituted for the common law remedy. While the *right* here involved rests primarily upon our usury statute and would not exist in the absence of such statute, we think an ordinary civil action, that being our substitute for the common law remedy, furnishes a remedy available to the debtor to recover the money or property unlawfully taken from him in payment of usurious interest. We are unable to see that a debtor having money or property thus unlawfully taken from him is in any different situation, so far as his right to have the same restored is concerned, than if it were taken from him in some other unlawful manner. Nor can we see that his right to restoration is any different because the taking is made unlawful by statute instead of by the common law. In the text of 2 Ency. Plead. & Prac., 1018, under the head of *assumpsit*, it is said:

“The count for money had and received is sustainable where money has been paid by mistake, or upon a consideration which happens to fail; or for money obtained through imposition, extortion, or oppression, or an undue advantage taken of the plaintiff’s situation, contrary to the laws made for the protection of persons under those circumstances.”

We are of the opinion that, at least in so far as money or property is exacted in payment of interest above the highest

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rate permitted by our usury statute, the same may be recovered by the payer thereof in a civil action prosecuted by him as plaintiff. It follows that appellant's complaint states a good cause of action as against the general demurrer. The question of appellant's right to recover in this action more than the excess so paid by him above the highest rate allowed by our usury statute is not presented in the briefs of counsel, so we leave that question for future examination.

The judgment is reversed, with directions to overrule respondent's demurrer to the complaint, and for further proceedings not inconsistent with the views herein expressed.

MORRIS, CHADWICK, GOSE, and MOUNT, JJ., concur.

[No. 11205. Department One. July 23, 1913.]

OTTO JOHNSON, *Appellant*, v. COLUMBIA & PUGET SOUND
RAILWAY COMPANY, *Respondent*.¹

MASTER AND SERVANT — INJURY TO SERVANT — PROXIMATE CAUSE — EVIDENCE — SUFFICIENCY. In an action for personal injuries to a blacksmith's helper, through the use of an improper style of tongs, which it was alleged could not safely hold the iron to be welded, the use of such tongs was not negligence nor the proximate cause of the accident, where it appears that the tongs used held the iron in position at the time of, and had nothing to do with, the cause of the accident.

SAME — RES IPSA LOQUITUR. In an action for personal injuries sustained by a blacksmith's helper who was struck when a piece of iron that was being welded by a steam hammer slipped out and fell, there can be no recovery on the ground of *res ipsa loquitur*, where there was nothing to show what caused the iron to slip and no proof of negligence; since it was necessary for plaintiff to show that it was caused by defective machinery or some extraordinary or negligent act under the control of the defendant.

Appeal from a judgment of the superior court for King county, Tallman, J., entered November 2, 1912, dismissing

¹Reported in 133 Pac. 604.

an action for personal injuries sustained by a blacksmith's helper, on granting a nonsuit. Affirmed.

E. F. Kienstra, for appellant.

Farrell, Kane & Stratton and *Stanley J. Padden*, for respondent.

MOUNT, J.—This action was brought by the plaintiff to recover damages for personal injuries. After the issues were made up, the case was tried to the court and a jury. At the close of the plaintiff's evidence, the trial court, upon motion of the defendant, granted a nonsuit and dismissed the action, for the reason that no negligence on the part of the defendant was shown. The plaintiff has appealed.

The facts, as shown by the appellant's evidence, are substantially as follows: The appellant was employed by the respondent as a helper to a blacksmith. He had been engaged in this work for about ten days. On the 20th day of October, 1910, he was engaged with the blacksmith in welding a tooth for a steam shovel. This tooth consisted of a piece of iron about twenty inches long and six by six inches square. This iron was being welded under a steam trip hammer. It was the duty of the appellant to manipulate certain chains which extended from a crane to the tongs and iron, thereby placing the iron between the die and the trip hammer. The iron being welded was held by a pair of tongs which are designated as "straight lipped" tongs. The blacksmith was assisted by another helper whose duty it was to manipulate the trip hammer. The blacksmith himself manipulated the iron under the hammer. While engaged in this work, the iron, in some manner not explained in the evidence, fell from the die, or slipped out from between the die and the hammer, and fell to the floor. The end of the tongs swung towards the appellant and struck him on the side and injured him.

The negligence alleged in the complaint was that the blacksmith used "a defective, unsafe and improper tongs, not suitable for such purpose, to wit: said tongs being what is

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known as the straight lipped, and not considered safe or suitable for such heavy work because of its straight lip . . . and not constructed or intended to safely hold such large pieces of iron steady or to prevent the same from shifting or jumping while being welded, and said tongs were negligently used by the respondent instead of the 'pick' style designed and constructed for such use or work."

The second ground of negligence alleged was that the foreman of the respondent, being in control of the operation of the steam hammer and the employees, negligently ordered the helping operator to hammer or strike and hammer the iron with more force, and to use the full striking capacity of said hammer, which caused the iron to jump or kick from under the hammer and the said defective tongs to strike appellant, inflicting the injuries set out in the complaint.

There was some evidence which tended to show that the straight lipped tongs which were used on this occasion were not safe or proper tongs to be used upon work of this character, by reason of the fact that the straight lipped tongs would not hold the iron solidly; that another pair of tongs which were commonly called the "pick" style would, by reason of their construction, hold large pieces of iron solidly and not permit such iron to slip within the tongs. But it was conceded upon the trial of the case that the straight lipped tongs which were used upon this occasion did not slip upon the iron, and did not permit the iron to slip within the jaws of the tongs; for after the iron fell to the floor, the tongs still held the iron firmly and solidly in position. The fact that improper tongs were used, therefore, was not the proximate cause of the injury, because these tongs held the iron as firmly as any other character of tongs could have done. There was, therefore, no negligence in using these tongs; or if there was negligence in the use of the tongs, such negligence did not cause the injury.

The other ground of negligence alleged was that the foreman ordered the helper operating the hammer to strike the iron

with more force. As one of the witnesses said, "Hit her harder." We find nothing in the case to show that this caused the iron to fall out from between the die and the hammer. In fact, there is no evidence which tended to show that hitting the iron harder caused it to slip out from between the die and the hammer. Nor is there any evidence to show that it was unusual for the hammer at that time to use more force; or that it was unnecessary for the hammer to strike with more force at that time. We find nothing in the evidence which shows, or even tended to show, that the respondent was negligent, or that its negligence was the cause of the injury. The appliances, except perhaps the tongs, were the kind commonly used, and were in good repair. The tongs, even though we may conclude that they were not the kind which should have been used, held the iron perfectly and did not permit it to slip. Such negligence, therefore, did not cause the injury. Before the appellant can recover in a case of this character, it must be shown that there was some negligence on the part of the respondent which caused the injury. *Hansen v. Seattle Lumber Co.*, 31 Wash. 604, 72 Pac. 457.

It is contended by the appellant that the mere fact that the accident happened was sufficient to take the case to the jury. In other words, that the rule *res ipsa loquitur* applies in this case. In *Lynch v. Ninemire Packing Co.*, 63 Wash. 423, 115 Pac. 838, we said:

"The maxim of *res ipsa loquitur* is applied in negligence cases on the theory that the accident, in the light of surrounding circumstances, is of such a character as to raise a presumption of negligence from the occurrence itself; and on the further theory, that the injured party is not in a position to explain its cause; while the party charged, having more favorable opportunities, is in a position to thus explain and show himself free from negligence, if such be the case."

In *Lewinn v. Murphy*, 63 Wash. 356, 115 Pac. 740, Ann. Cas. 1912 D. 433, we said:

"The doctrine of *res ipsa loquitur* . . . has never been applied by the courts except where the facts and demands of

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justice make its application essential, depending upon the peculiar facts and circumstances in each particular case, and where the duty which the defendant owes the injured person is of such a nature that proof that the accident happened under the given conditions is of such value in law as to afford evidence of negligence in itself, and thus make out a *prima facie* case; and only then when the producing cause of the injury is under the control of the defendant, and the accident is of such a nature that it would not ordinarily occur except from the lack of due care."

We find nothing in the record in this case which brings it within the rule stated. The cause of the iron slipping from between the hammer and the die is not explained in the evidence. It was necessary for the appellant to show that this was caused by defective machinery or by some extraordinary or negligent act over which the respondent had control. This was not shown. We conclude, therefore, that the trial court properly granted a nonsuit. The judgment is therefore affirmed.

PARKER, CHADWICK, and GOSE, JJ., concur.

[No. 11237. Department One. July 23, 1913.]

JENNIE L. HOPE *et al.*, Appellants, v. BERIAH BROWN *et al.*,
*Respondents.*¹

BOUNDARIES—LOCATION—PRIMA FACIE CASE—EVIDENCE—SUFFICIENCY. In a controversy over the location of a common boundary line, evidence of a witness that a post was by general reputation supposed to be on the section line, does not necessarily establish *prima facie* the true location of the section line.

EJECTMENT—TITLE—EVIDENCE—BURDEN OF PROOF. In ejectment, peaceable possession by the defendant, acquired without ousting plaintiff, is sufficient evidence of title to place the burden of proof on the plaintiff to show a better title.

¹Reported in 133 Pac. 612.

Appeal from a judgment of the superior court for Kitsap county, Yakey, J., entered August 3, 1912, upon findings in favor of the defendants, in an action of ejectment, tried to the court. Affirmed.

Moore, Wardall, Wardall & Martin, for appellants.

Geo. M. McKay, for respondents.

PARKER, J.—The plaintiff seeks to recover from the defendants the possession of a tract of land lying along the common boundary line of two five-acre tracts. The southerly one of these five-acre tracts is owned by the plaintiffs, while the northerly one is owned by the defendants. The controversy arises over the true location upon the ground of the common boundary line running east and west between these two tracts. A trial before the court without a jury resulted in findings and judgment in favor of the defendants, from which the plaintiffs have appealed.

On October 14, 1890, William Motherway owned a large tract of land embracing these two five-acre tracts. On that day he conveyed to Frederick J. Hope the southerly tract, describing it as follows:

“Commencing at the meander post of Dye’s Inlet, on the section line between sections 20 and 29, Township 25 North, Range 1 East, W. M.; thence west along the same section line 566.5 feet; thence north 297 feet; thence east 900 feet to the meander line; thence in a southwesterly direction along the meander line to the place of beginning; containing 5 acres, more or less.”

On the same day he also conveyed to Harriette E. Williams the northerly tract, describing it as follows:

“Commencing at a point 566.5 feet west, and 297 feet north of the meander post between section 20 and 29 Twp. 25 North, Range 1 east W. M. running thence north 234 feet, thence east 967 feet to the meander line, thence southerly along the meander line, to a point east of the place of beginning, thence west 900 feet to the place of beginning; containing 5 acres more or less.”

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These two conveyances are the source of the respective titles of the parties to this action, all the mesne conveyances being made by the same descriptions. Thus it is rendered plain that there is no encroachment of one tract upon the other so far as the descriptions in the conveyances are concerned, and that they have a common boundary line running east and west.

There is little else than questions of fact involved in this controversy. Appellants rest their claim to the land in dispute upon an alleged agreed boundary line, and adverse possession; as well as their claimed true location of the section line on the south of their tract. The trial court found against them upon all of these questions. We have carefully read all of the evidence, much of which is conflicting, contained in the somewhat voluminous record, and feel constrained to agree with the trial court in its conclusions upon these questions. We see no useful purpose in a discussion of the evidence in detail here, though we will say a word touching the section line location.

The record is almost wholly barren of any evidence tending to show the true location of the section line upon the ground. Evidence sufficient to convince the court of such location would, of course, be decisive of the controversy, aside from the questions of agreed boundary and adverse possession. Appellants did not offer any evidence which can be regarded as at all convincing showing a survey of that line as claimed by them. Other evidence introduced by them to prove its location consisted only of the testimony of a single witness of some years' residence in the neighborhood, who was asked and answered as follows:

"Q. Was that post by general reputation in the neighborhood supposed to be on the section line between sections 20 and 29? A. Yes, sir."

This referred to a post claimed to be the "meander post" on the section line, mentioned in the descriptions of the conveyances. We think this was not sufficient to warrant us in hold-

ing that the trial court was bound to regard this evidence as even *prima facie* establishing the true location of the section line. It is true, respondents offered no evidence as to the true location of that line, but they were in peaceable possession of the land in dispute, and had acquired that possession without ousting appellants of possession, as the trial court evidently believed and we think was warranted in believing from the evidence. This peaceable possession on the part of respondents was sufficient evidence of title in them to place the burden of showing a better title upon appellants. Our decision in *Dicus v. Major*, 72 Wash. 398, 130 Pac. 474, and the authorities there reviewed support this view.

We conclude that the judgment must be affirmed. It is so ordered.

GOSE, MOUNT. and CHADWICK, JJ., concur.

[No. 11206. Department Two. July 23, 1913.]

JAMES ENGLESOn, *Respondent*, v. PORT CRESCENT SHINGLE COMPANY, *Appellant*.¹

FRAUDS, STATUTE OF—REAL ESTATE—BROKERS—COMMISSIONS. Standing timber is "real estate," within the statute of frauds, Rem. & Bal. Code, § 5289, requiring contracts for a broker's commission for the sale of real estate to be in writing.

SAME—WRITING—SUFFICIENCY. Under the statute of frauds requiring an agreement to pay a broker's commissions to be in writing, the writing is insufficient where it neither describes the property to be sold nor specifies the amount of the commissions to be paid.

SAME—CONTRACT FOR COMMISSIONS. A contract to procure persons who would buy standing timber, for which the party was to be paid for his trouble is, in its essence, a contract employing a broker to sell standing timber on commission, and within the statute of frauds.

Appeal from a judgment of the superior court for King county, Humphries, J., entered March 7, 1913, upon the ver-

¹Reported in 133 Pac. 1030.

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dict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

T. F. Trumbull and Farrell, Kane & Stratton, for appellant.

George B. Cole and Gay & Olson (Milo A. Root, of counsel), for respondent.

FULLERTON, J.—In this action the respondent recovered against the appellant for services rendered in the sale of certain timber owned by the appellant; a part of such timber being upon lands owned by the appellant, and a part thereof on lands of third persons who had sold the timber on such lands to the appellant. The contract on which the recovery was had is set forth in the complaint in the following language:

“(2) That on or about the forepart of the month of January, 1912, defendants came to said Black Cat Employment Co. and orally informed said company that it, said defendant, had a large quantity of shingle timber for sale in Clallam county, Washington, and orally requested said Black Cat Employment Co. to procure and furnish said defendant a party or parties who would purchase said shingle timber, and then and there orally promised and agreed with said Black Cat Employment Co., that if said company would find, or procure, or furnish to defendant the name of a party who would purchase and contract for said shingle timber, that it, said defendant, would pay said Black Cat Employment Co. a reasonable sum or compensation for so furnishing said defendant said party.

“(3) That thereafter and during the forepart of the month of January, 1912, said Black Cat Employment Co. obtained and in writing furnished to defendant the names of several parties who were desirous of purchasing said shingle timber, and amongst said list of names was the Howell-Hill Mill Co., a Washington corporation.

“(4) That thereafter and on January 18th, 1912, said defendant, in writing, acknowledged the receipt of said list of names of parties so furnished defendant by said Black Cat Employment Co. and then and there wrote said Black Cat

Employment Co. that it had written said Howell-Hill Mill Co. as well as each of said parties so furnished by said Black Cat Employment Co., and requested said Black Cat Employment Co. to 'Keep on working on this,' and then and there agreed to pay said Black Cat Employment Co. for its trouble. (A copy of which said writing and said letter sent said Howell-Hill Mill Co., is hereto attached, marked Exhibit 'A' and 'B' respectively, and made a part and portion of this paragraph by reference, the same as though set out in *haec verba* and immediately following).

"(5) That said Howell-Hill Mill Co. was ready, able, anxious and willing to enter into a contract and to purchase said shingle timber, and thereafter and on May 23d, 1912, by and through the efforts of said Black Cat Employment Co. as in this complaint set forth, said defendant did sell to said Howell-Hill Mill Co. and said Howell-Hill Mill Co. did purchase and contract to purchase and buy from said defendant, said shingle timber, the location of which said timber, and the price and terms, conditions thereof, and each and all thereof are more particularly set forth in Exhibit 'C' hereto attached and made a part and portion of this paragraph by reference, the same as though set out in *haec verba* and immediately following."

The writing referred to in the complaint as containing a promise to pay for the services rendered is in the form of a letter and reads as follows:

"Black Cat Emp. Office. Port Crescent, Wash., 1-18-12.

"Seattle, Wash.

Gentlemen: Enclosed is a copy of a letter we sent to Howell-Hill Mill Co. Have also written each of the other parties you named for us. Keep working on this and we will pay you for your trouble if we can close with any of them. Do not expose those prices when not necessary.

"Very truly yours,

"Port Crescent Shingle Co.,

"By J. M. Joyce."

A demurrer was interposed to the complaint, on the ground that it failed to state facts sufficient to constitute a cause of action, the precise objection being that the contract sued upon was within the statute of frauds. The demurrer was

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overruled, whereupon the appellant answered, taking issue on all the material allegations of the complaint, and setting up certain affirmative defenses not necessary here to notice. On the issues made, a trial was entered upon before a jury, at which the evidence of the respondent tended to substantiate the allegations of his complaint, with the additional particular that the greater part of the timber was uncut timber standing and growing upon lands situated in Clallam county. At the conclusion of all the evidence, the appellant challenged its legal sufficiency to warrant a recovery against it, again contending that the contract sued upon, and shown to have been entered into by the evidence, was within the statute of frauds. The challenge was denied, and the cause was submitted to the jury under the following instructions:

"This, in short, is an action for commission . . . If you find that the plaintiff pursuant to such employment brought together the defendant and said Howell-Hill Mill Company, or that they were brought together at his instance, and pursuant to a suggestion of plaintiff to the defendant, or to said Howell-Hill Mill Company, and that the defendant and said Howell-Hill Mill Company entered into such an arrangement of purchase, or for the cutting of said timber, and that the defendant promised to pay the plaintiff for services in doing this thing, then I instruct you that the plaintiff is entitled to recover whatever would be the reasonable value of his services for so doing; and in determining what is the reasonable value of his services, you may take into consideration what the ordinary commission or compensation is that is customarily allowed for such services in this community. In fixing the value of the plaintiff's services, in case you find he did render the services, which he alleges with the results which he alleges, you are not to be bound solely by the length of time, or shortness of time, that he consumed in bringing the defendant together with the Howell-Hill Mill Company, but you may also take in consideration what the general custom is in brokerage business of this character, and if you find that it is the general custom to pay commission at a certain rate for this kind of service, and find that plaintiff rendered such services, then you are permitted to allow him compensation at the rate of commission testified to as being customary, and based upon

the reasonable market value of the timber at that time, as you find such reasonable market value to be shown by the fair preponderance of the evidence in the case.”

The jury returned a verdict in favor of the respondent for the sum of \$1,500 on which judgment was rendered as before stated.

The statute (Rem. & Bal. Code, §5289; P. C. 203 § 3), provides, that an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission, shall be void unless such agreement, or some note or memorandum thereof, be in writing and signed by the party to be charged. The principal question suggested by the record is, therefore, whether the contract on which the recovery was had falls within this statute. As shown by the quotation from the complaint, the appellant orally requested the respondent to procure and furnish a purchaser for its shingle timber situated in Clallam county, which timber was not severed from the realty, but was standing and growing thereon. Whether, therefore, the contract was valid or void must depend upon the answer to the question, was the timber a part of the realty upon which it was standing, or was it personal property.

That growing timber was regarded as pertaining to the real property upon which it stood, under the common law, there can be little if any doubt. Being the product of nature, and attached to and partially imbedded in the soil, it was considered by all of the older writers as a part of the inheritance, and not as emblements passing to the administrator on the death of the owner. That the rule is still the same in most of the American jurisdictions is shown by the cases collected in the note to *Ives v. Atlantic & N. C. R. Co.*, 9 Ann. Cas. 188. The rule, as announced by some of the state courts, is that a verbal sale of standing timber is a license authorizing the purchaser to enter and cut and remove timber until the license is revoked, but it is at the same time held that a contract for

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the sale of standing and growing timber must be in writing before it can be specifically enforced against the vendor.

In *Seymour v. LaFurgey*, 47 Wash. 450, 92 Pac. 267, this court held that an action to rescind a contract for the removal of standing timber was local, and that a change of venue to the county of the defendant's residence was properly denied. And in *Thill v. Johnston*, 60 Wash. 393, 111 Pac. 225, it was held that an oral agreement purporting to abrogate a written contract for the sale of standing timber was void, the reason given being that the original agreement was one for the conveyance of real property, and hence required to be in writing and could not be abrogated by an executory parol agreement. These cases, while not directly in point, clearly indicate that the court believed that the rule of the common law on the question here involved prevailed in this state. This, we think now, is the better rule, and it follows that the contract sued upon falls within the statute above cited.

Was the agreement by which the respondent was employed to find a purchaser for the property in question in writing within the meaning of the statute? The claim that it is so is founded on the letter of January 18, 1912, which we have quoted. But it is manifest that this is insufficient for the purpose under the authority of the cases of *Keith v. Smith*, 46 Wash. 131, 89 Pac. 473; *Foote v. Robbins*, 50 Wash. 277, 97 Pac. 103; *Forland v. Boyum*, 53 Wash. 421, 102 Pac. 34; and *Crouch v. Forbes*, 63 Wash. 564, 116 Pac. 14. These cases lay down the rule that a writing sufficient to satisfy the statute must be coextensive with the stipulations of the parties; that is to say, it must express the entire contract and leave nothing that pertains to the essentials of the contract to be supplied by parol. The contract here in question neither describes the property to be sold, nor specifies the amount of commission or compensation that will be paid for the services, and under the rule as we have heretofore announced it is plainly insufficient.

We are aware that the respondent argues:

"In this case, respondent did not sue for services as an agent in selling standing timber, nor for selling anything. He was employed to find somebody who would enter into a milling proposition with appellant. It was not a proposition to sell some real estate; it was not a proposition, even, of selling the timber standing upon the land; but it was a proposition of getting some one who would enter into a deal with appellant for the building of a mill, the cutting, removing and payment for, of certain timber, part of which was standing and part of which was lying upon certain lands. Appellant desired some company to come upon those lands with a mill and with a logging outfit and convert the timber into lumber or shingles and pay therefor.

"Respondent was employed by appellant to secure someone who would do this, and who would enter into the necessary agreement and arrangement for bringing this about. The services of respondent were engaged by appellant for this purpose, and they resulted successfully for appellant. Through respondent's efforts and influence negotiations were opened up between appellant and the Howell-Hill Mill Company, which resulted in a contract whereby the latter company undertook to locate a mill, cut and remove certain timber and do various other things."

But this was not the cause of action stated in the complaint, nor was it the theory upon which the case was tried. The allegation of the complaint is that the appellant orally requested the respondent "to procure and furnish . . . a party or parties who would purchase said timber," and agreed in writing to pay the respondent for its trouble. The instructions of the court were founded on the same theory. He charged the jury directly that the basis of recovery was for commissions earned, and that the jury could allow the respondent "compensation at the rate of commission testified to as being customary." Moreover, the contract, as shown by the evidence, was in its essence a contract employing a broker to sell standing and growing timber on commission, and its nature cannot be changed by calling the services performed by another name.

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The judgment is reversed and remanded with instructions to enter a judgment in favor of the defendant, the appellant in this court, to the effect that the respondent take nothing by his action.

MAIN, ELLIS, and MORRIS, JJ., concur.

[No. 11139. Department Two. July 23, 1913.]

SEATTLE NATIONAL BANK, *Respondent*, v. J. A. BECKER
et al., *Appellants*.¹

BILLS AND NOTES—INDORSEMENT—CONDITIONAL DELIVERY—ANSWER—SUFFICIENCY. In an action against the indorsers of a note, it is a good defense as against the payee that the defendants indorsed the note on condition that the payee would secure additional indorsers before the note should be binding on them, which the payee agreed but failed to do; and an answer setting up such facts sufficiently pleads a conditional delivery of the note.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered October 7, 1912, in favor of the plaintiff, upon sustaining a demurrer to affirmative defenses, in an action on a promissory note. Reversed.

Edgar S. Hadley, for appellants.

Bausman & Kelleher, for respondent.

MORRIS, J.—Appeal from a judgment upon a promissory note, after sustaining a demurrer to affirmative defenses.

The appellants pleaded two affirmative defenses. The first need not be referred to, as in our judgment it was demurrable. The second affirmative defense was as follows:

“That on or about the 1st day of June, 1911, the Pacific Steel Furniture Co., being indebted to the plaintiff, was required to give a note in renewal thereof and these defendants were requested by said bank to endorse said note; that it was agreed that as a further endorser on said note the plaintiff

¹Reported in 133 Pac. 613.

would secure the endorsement of Hartley D. Smith and Minnie E. Smith, his wife, and would take the property hereinabove described as security for said loan; that the defendants stated to the plaintiff they would not endorse said note unless the plaintiff further secured the endorsement of said Hartley D. Smith and Minnie E. Smith, his wife, and it was so agreed by the plaintiff and upon that understanding and not otherwise these defendants attached their names to the said note and delivered the same to the plaintiff with the understanding and agreement that before said note would be binding upon them or they would be liable thereon, the plaintiff would secure the endorsement of the said Hartley D. Smith and wife and would first satisfy said note from the property deeded to them and from other property of the said Hartley D. Smith and Minnie E. Smith; that contrary to this agreement and without any knowledge of these defendants the plaintiff failed and neglected to secure the endorsement of the said Minnie E. Smith, contrary to their agreement and to the agreement of all the parties as to the delivery and liability of these defendants upon said note."

We believe this to be a good defense, and the court below was in error in sustaining a demurrer thereto. The delivery pleaded was a conditional one, and as against appellants, the instrument was not complete until the terms of the conditional delivery had been fully complied with. We think this defense plainly pleads that appellants indorsed the note on condition that the payee would secure additional indorsements before the note would be binding upon appellants; and with such a plea, it was good as against the demurrer. *Young v. Smith*, 14 Wash. 565, 45 Pac. 45; *Seattle v. Griffith Realty & Banking Co.*, 28 Wash. 605, 68 Pac. 1036; *McCormick Harvesting Mach. Co. v. Faulkner*, 7 S. D. 363, 64 N. W. 163, 58 Am. St. 839. For this error the judgment is reversed.

MAIN, ELLIS, and FULLERTON, JJ., concur.

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[No. 11358. Department Two. July 23, 1913.]

REEVES AYLMOORE, JUNIOR, *Appellant*, v. M. L. HAMILTON
et al., *Respondents*.¹

COUNTIES — BONDS—ELECTION — SUBMISSION—SINGLE PROPOSITION. An election authorizing a county bond issue for the construction of various highways and bridges is not invalid as the submission of distinct and unrelated objects as a single proposition, where it embraced a comprehensive system of county roads and bridges, although some of the roads were on islands separated from its companion parts on the mainland; since that does not destroy the unity of the system.

SAME—BONDS—VALIDATION. The submission of a bond issue for the construction of various county roads and bridges as a single proposition is validated by Laws 1913, p. 63, expressly so providing, where the county commissioners shall find that the proposition has for its object the construction of a system of county highways, and validating any such bonds where the submission would have been authorized under the act, if submitted at any time within one year prior to the taking effect of the act.

Appeal from a judgment of the superior court for King county, Albertson, J., entered July 8, 1913, dismissing an action for equitable relief, upon sustaining a demurrer to the complaint. Affirmed.

Arthur E. Nafe and *Reeves Aylmore, Jr.*, for appellant.

John F. Murphy, Robert H. Evans, and *John P. Hartman*, for respondents.

MORRIS, J.—It is sought in this action to restrain the sale of an issue of \$3,000,000 of King county road bonds, the case coming here on an appeal by the plaintiff from a judgment sustaining a demurrer to his complaint. The facts, so far as necessary to be stated for a proper understanding of the question submitted, are these:

On September 30, 1912, the county commissioners of King county passed a resolution submitting to the qualified electors of King county the question of whether or not bonds in a

¹Reported in 133 Pac. 1027.

sum not exceeding three million dollars should be issued for strictly road purposes. Pursuant to this resolution, an election was duly held, and the proposition carried by the requisite majority. The county commissioners thereupon issued the bonds and passed a resolution providing for their sale, when this suit was commenced seeking to enjoin said sale.

No question is raised as to the validity of any of the proceedings prior to the election; and while the complaint alleges a number of reasons why the election and bonds should be held invalid, the main contention, and in fact the only one discussed in the briefs or upon the argument, is that the bonds are invalid because of the fact that, included in the proposition submitted which called for but one affirmative or negative vote, were twenty-seven different roads and fifteen bridges in various parts of the county, it being contended in this connection that each of these roads and bridges is a several and distinct purpose in no way related to each other, thus bringing this case squarely within the rule announced by this court in *Blaine v. Seattle*, 62 Wash. 445, 114 Pac. 164, Ann. Cas. 1912 D. 315, where it was held that a proposition to issue bonds for sites for fire houses, for the construction of fire houses, a site for a city stable, a combined fire house and dock, a police sub-station, an isolation hospital, a bridge on Spokane avenue, and a bridge on Westlake avenue, were eight several and distinct propositions and that their submission as one proposition in such a manner that the voter was compelled to vote for or against all of them, was invalid.

The respondent, on the other hand, contends that the ruling of the lower court should be affirmed upon the authority of *Blaine v. Hamilton*, 64 Wash. 353, 116 Pac. 1076, 35 L. R. A. (N. S.) 577, where it was held that an election to authorize a bond issue was valid where the proposition requiring one affirmative or negative vote included, (1) the excavation of a canal connecting Salmon Bay and Lake Washington, (2) the deepening of the Duwamish river, (3) the diver-

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sion of the waters of Cedar river into Lake Washington, and (4) the erection of wharves or docks in aid or furtherance of these improvements, and that these purposes were so related as in fact to constitute one general project for the creation of a great harbor and utilization and uniting of the waters in and about it.

With this latter view, we are in full accord. Each of these *Blaine* cases finds support in two distinct and well recognized rules. The first is that where different questions are submitted, when such questions or their subjects and purposes are not naturally related or connected in such a way as to require but one affirmative or negative vote, the proceeding is invalid. It was accordingly held in the first *Blaine* case that the eight propositions, there submitted as one, were so distinct, unrelated and independent that they could not be united or joined as one. The second *Blaine* case finds its support in the other rule, that where several parts of a proposition submitted as one and calling for but one affirmative or negative vote are so related, united and dependent as to form but one rounded whole, such submission is valid; and it was accordingly held that, it appearing that the four questions submitted in that case were in aid of one general scheme—the creation of a great harbor at the city of Seattle and the utilizing of all adjacent waters for that purpose—the method of submission there employed was proper. We again had occasion to review these two rules in *Tulloch v. Seattle*, 69 Wash. 178, 124 Pac. 481, where a like question was submitted involving the validity of the bonds issued by the city of Seattle for municipal street railway purposes, and it was there held that the submission of a bond issue was not illegal as combining several distinct and unrelated objects where the bonds were to be used for the purchase of existing street railways, or in the alternative for the construction of parallel lines, in the discretion of the municipal officers; since the two purposes were natural related parts of but one object—the acquiring of a municipal street railway. We there dis-

cussed these *Blaine* cases, and pointed out the distinction between them and drew from them the two rules above advanced in saying that,

"Separate, distinct and independent purposes or objects may not be joined in one proposition for submission to the voter. United, related and dependent objects, that together form one general scheme or plan, may be united and submitted as one. No better illustrations of the application of these two principles may be found than in *Blaine v. Seattle* falling within the first rule, and *Blaine v. Hamilton* falling within the second rule."

With this recent discussion and announcement of the law, it only remains to refer to the facts as clearly bringing this case within the second rule, and within that line of cases to which *Blaine v. Hamilton* and *Tulloch v. Seattle* belong. The proposition submitted embraced but one subject; a comprehensive system of county roads. The fact that it is comprehensive does not destroy its unity. It is one subject composed of many parts, each bearing its relation to the whole and each bearing its relation to every other part. Employing the test suggested in the *Hamilton* case, "Are the several parts of the project so related that united they form but one rounded whole," the facts present a clear case. The whole is the county highway. The several parts are the different roads that together form that highway. Because one of these roads is on Mercer Island separated from the mainland by the waters of Lake Washington, another on Vashon Island separated from its companion parts by the waters of Puget Sound, does not destroy the unity of the system nor make these roads several and distinct projects. They may be several distinct parts of one project, but they all unite to form but one project and that a comprehensive county highway that will furnish a beneficial access to all portions of the county.

In *Oakland v. Thompson*, 151 Cal. 572, 91 Pac. 387, a like question was presented. The city of Oakland sought to acquire several detached pieces of land in different portions

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of the city for public parks, and submitted it to the voters as one proposition. This method was questioned under a contention that each piece of land should have been submitted as a several and distinct proposition. The court, in passing upon this contention, held that, where the scheme had in contemplation the acquisition of several distinct parcels of land widely separated, to be converted into separate parks, it was but a single scheme and the purpose a single purpose.

A like ruling may be found in *State ex rel. Horsley v. Carbon County*, 38 Utah 563, 114 Pac. 522, where the county submitted a proposition to issue bonds to build roads and bridges in the county, as one proposition. The same attack was made as here, that the purposes were several and distinct and could not be united as one proposition calling for but one vote, and it was held the single submission was proper.

There is another reason why these bonds should be sustained. Chapter 25 of the Laws of 1913, page 63, § 1, provides:

“The question of the issuance of bonds for any undertaking which relates to a number of different roads or parts thereof, whether intended to supply the whole expenditure or to aid therein, may be submitted to the voters as a single proposition in all cases where such course is consistent with the provisions of the state constitution. If the county commissioners in submitting any such proposition relating to different roads or parts thereof find that such proposition has for its object the furtherance and accomplishment of the construction of a system of public and county highways in such county, and constitutes and has for its object a single purpose, such finding shall be presumed to be correct, and upon the issuance of the bonds such presumption shall become conclusive.”

A subsequent section provides for the validating of any bonds where the submission would have been authorized under this act, had it been in force, if submitted to the people at any time within one year prior to the taking effect of the act. These bonds were submitted within that time, and are

subject to the validating provisions of the act. We therefore conclude the bonds are in all respects valid, and the judgment of the lower court is affirmed.

MAIN, ELLIS, and FULLERTON, JJ., concur.

[No. 11262. Department Two. July 23, 1913.]

THE STATE OF WASHINGTON, *on the Relation of Grant Smith & Company, Respondent*, v. THE CITY OF SEATTLE,
Appellant.¹

MUNICIPAL CORPORATIONS — IMPROVEMENTS — GRADING CONTRACT — CONSTRUCTION — PAYMENTS — BONDS — ACCRUED INTEREST. Where a grading contract provided that there should be delivered to the contractors bonds in the face amount of seventy per cent of the work done during the preceding calendar month as shown by monthly estimates, the contractors are not entitled to interest accrued between the date of the bonds and their delivery, although a budget ordinance directed payments to the contractor of bonds in the principal sum of seventy per cent of the monthly estimates and such additional sum as may be required to pay all interest that may legally accrue; since the contract required payment for work in bonds at their face value or par and not at a premium or bonus equal to the accrued interest at the time of delivery.

SAME — PAYMENTS BY CITY — AUTHORITY — MISTAKE — OVERPAYMENTS — RECOVERY — ESTOPPEL. In such a case, the fact that city officials delivered the bonds to contractors without detaching the coupons for interest accrued before delivery, does not estop the city from recovering the overpayment, or vest any right thereto in the contractors, on the theory that it was a voluntary payment or made under a mere mistake of law; since the payments were made by officials without authority and in violation of law.

JUDGMENTS — RES JUDICATA — MATTERS CONCLUDED. A judgment in favor of contractors in a mandamus proceeding determining merely that the contractors were entitled to be paid for additional yardage required in street grading work, is not *res judicata* in a subsequent action to determine the amount due to the contractors on final com-

¹Reported in 133 Pac. 1005.

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pletion of the work, for which an assessment should be levied, nor a bar to an offset by the city for moneys in the hands of the contractors by reason of overpayments during the progress of the work, where that question was not litigated in the former action.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 25, 1913, in favor of the relators, in mandamus proceedings to compel the levy of a supplemental local improvement assessment. Reversed.

James E. Bradford and *Howard A. Hanson* (*James Kiefer*, of counsel), for appellant.

Preston & Thorgrimson and *Turner & Hartge*, for respondents.

MORRIS, J.—In this action, respondents, the contractors in the local improvement known as the Denny Hill regrade, sought to compel the city to levy supplemental reassessments upon private property in the amount of \$76,112.19. To this demand the city pleaded an offset of \$47,696.11 accrued interest on certain bonds delivered to the contractors, and offered to levy further assessments to make up the difference between these two amounts. This offer was rejected by the court below, and judgment went for the respondents as prayed for.

The facts material to the inquiry here are about as follows: The city, having determined upon the improvement, which consisted in the regrading of portions of several parallel avenues, and comprising locally what is known as the Denny Hill regrade, called for bids under which the contract was let to the respondents. This contract provided that the contractors should slope back upon private property to the extent of one to one and remove the earth involved in such slope as part of the cost and expense of the regrading. The regrade involved various deep cuts, and the removal of the remaining earth upon the private property to the approximate new level of the streets. To this end, a provision was inserted in the contract, by which the contractors bound them-

selves to excavate the earth from any private property in the district when so requested by the property owner at the same rate per cubic yard as was involved in the contract with the city. Under this provision, the contractors, in a large number of cases, entered into contracts with various owners of abutting property to remove the earth on such private property "so as to bring the level thereof to an even grade with the street or streets abutting the same, as established by city ordinance."

After commencing work upon this contract, and when approximately 26 per cent of the work had been completed, the city confirmed an assessment roll for the estimated cost and the expense of the improvement, and paid to the contractors upon this roll, in March 1909, about \$62,000. On May 10, 1909, bonds in the principal sum of \$741,757.01 were drawn up and dated by the city comptroller, for delivery to the contractors from time to time in various amounts, as called for by monthly estimates. These bonds, which under the law were obligations against the local improvement district but not against the city as a whole, were payable ten years from and after the date of their issue, with interest at the rate of six per cent per annum; each bond having attached thereto ten coupons representing each year's interest on the bond. Under the terms of the contract, it was provided that no claim should be made for any portion of the contract price until, in pursuance of law, charter, and ordinance, the bonds could legally be issued.

The contractors thereafter assumed the financing of the improvement, up to such time as under this provision of the contract the bonds could be legally issued. Each month after the commencement of the work, a monthly engineer's estimate was made up of the work during the preceding calendar month. Upon this estimate, the contractor received a warrant for seventy per cent of the work; some of these warrants being redeemed in March, 1909, from the first proceeds of collection upon the assessment roll amounting to the cash

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payment of \$62,000. Those warrants not redeemed in this manner were exchanged for bonds later.

It was further provided in the contract that, after the confirmation of the assessment roll, there should be delivered to the contractors bonds in the face amount of seventy per cent of the work done during the preceding calendar month, as shown by the monthly estimate. This amount was due and payable on or about the 25th of each month. To these bonds, so delivered from time to time, were attached all interest coupons; and at the time of the several monthly deliveries, certain interest had accrued from the date of the bonds, May 10, 1909. It was further provided that thirty per cent of the cost and expense of the amount should be reserved by the city for the protection of lien claimants. This reserve was withheld from each monthly payment, and under the contract did not become payable until thirty days after official notification to the city comptroller that the contract had been completed and accepted. This thirty per cent reserve became payable to the contractors on April 25, 1911, and bonds therefor were delivered to the contractors on April 29, 1911. The accrued interest upon these bonds so delivered amounted to \$31,090.44. This item, together with the accrued interest upon the several monthly estimates subsequent to May 10, 1909, amounted to \$47,696.11. It is the accrued interest in this latter amount that the city urged as an offset to the demand of the contractors that the city take necessary steps to levy assessments in the full sum of \$76,112.19.

In considering the payment of the various monthly estimates, the city council passed a monthly budget ordinance ordering payments to the various local improvement contractors operating under the several contracts throughout the city. This ordinance directed the payments to the contractor of bonds in the principal sum of seventy per cent of the monthly estimate, and provided for the payment of such additional sum as "may be required to pay all interest that may

legally accrue on the warrants and bonds under this ordinance."

Our attention has not been called to any other provision of statute, charter, ordinance, or contract for the delivery to the contractor of coupons representing the interest which had accrued between the date of the bonds and their delivery. It is the city's position now that such delivery was without authority, and that the contractors have already received on account of the improvement this sum of \$47,696.11, representing the accrued interest, to which they were not entitled, and that such payment is in excess of the cost and expense of the improvement; and that the city is without power to assess private property for more than the cost and expense of the improvement, and therefore the city is entitled in this proceeding to offset the amount of such accrued interest. Other material facts necessary to a proper understanding of the situation here involved may be referred to.

In *Schuchard v. Seattle*, 51 Wash. 41, 97 Pac. 1106, it was held that property receiving damages in condemnation proceedings under the old law, where damages were offset against all benefits and a verdict returned for the excess, was exempt from special assessments, either upon the condemnation assessment roll or upon the local improvement assessment roll. This holding had a direct effect upon a number of assessments in the Denny Hill local improvement assessment roll, and apparently involved approximately \$70,000 of such assessments. The city, seeking to relieve itself from this situation, directed the contractors to slope back upon private property only to the extent of three-fourths to one, instead of one to one, as provided for in the original contract, leaving the wedge thus created to be removed at the cost of the property owner. Under this modification of the contract, the contractors proceeded with the improvement and sought, and in many cases did, collect from the several property owners who had signed private agreements for the removal of the earth upon their lots, an amount represent-

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ing the cost of removing this additional wedge. About this time, an action was brought against the contractors by one of the owners of abutting property who had signed such an agreement, claiming that such modification of the contract was void, and that under the original contract he could only be held to pay for the removal of the earth not involved in the one to one slope. This contention, reaching this court, was sustained in *Atwood v. Smith*, 64 Wash. 470, 117 Pac. 393. The contractors were thus deprived from enforcing their agreements with the private property owners for the recovery of any part of the earth involved in the slope of one to one. On the other hand, the city, having modified the contract, had been allowing monthly estimates which had been accepted by the contractors on the basis of the yardage removed in the street and the yardage moved from private property back to the slope of three-fourths to one; and unless, therefore, the contractors could by some means procure the payment of the cost of excavating this additional wedge from the city, they would be unable to receive payment for the work so done. An action in the nature of mandamus was thereupon brought against the city to compel it to include as an item for which the contractors were entitled to receive compensation the various monthly estimates of yardage removed in this additional wedge subsequent to October, 1908. The total yardage involved in this wedge was 281,897 cubic yards, which at the price provided for in the original contract, amounted to \$76,112.19. The contractors were successful in this proceeding, and the court below issued its writ as prayed for. The city, thereupon, following the mandate of the writ, passed an ordinance directing the reassessment of an amount sufficient to pay the contractors this sum of \$76,112.19, with interest thereon from the respective dates when such monthly payments would have become due and payable if they had originally been allowed by the city upon the original monthly estimate. When this roll came on for hearing before the city council, objections were interposed to its confirmation by

numerous property owners upon the ground that there was no authority in law for charging private property with this item of \$47,696.11 accrued interest. The city thereupon notified the contractors that it would confirm the assessment roll in an amount less this accrued interest item, and the contractors, refusing to accept this reduction, brought this action, in which it is sought to compel the city to levy a supplemental or reassessment sufficient to raise the entire sum of \$76,112.19. Upon the trial, the lower court refused to permit the city to offset the accrued interest paid. The city has appealed.

The question submitted by the appeal is the correctness of this contention: that the contractors should be charged with the interest earned or accrued upon the bonds from their date to the time of their respective delivery. It seems plain to us that, under the contract, the contractors were to receive in payment for their work bonds at their face or par value, and not bonds with accrued interest amounting to \$47,696.11, which would mean that, if the later plan of payment is permitted, the contractors would take the bonds, not at their face or par value, but at a discount of \$47,696.11. It is not questioned, as we understand the position of respective counsel, but that the contractors, in accepting these bonds in payment for the work, were to receive them at their face or par value. Section 8020, Rem. & Bal. Code, provides that local improvement bonds may be issued to contractors in payment for their work, or that the bonds may be sold at not less than their par value and accrued interest, and the proceeds thereof applied in payment of the amount due the contractor. If, under this section, the contractor takes the bonds in payment for his work, we think the only reasonable construction to be placed upon it is that he shall, as is the case when the bonds are sold to third parties, accept them at not less than par and accrued interest. It was not contemplated by the statute that there would be any difference in the amount paid the contractor whether he accepts bonds in payment for his work,

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or whether bonds were sold to others and the contractor paid in cash. These bonds were in the principal sum of \$100, and if the contractor is to accept them, he must accept them at their par or face value to the same extent that he accepts currency or gold at its face value. If, at the time of its delivery to the contractor, \$5 had been earned as interest on each bond, then the par or face value of that bond at that time would be \$105, and we know of no reason why the contractor should give credit for the payment of \$100 only, and retain the \$5 as a premium or bonus, any more than if paid in cash he should have the right to demand a bonus or premium of the same amount upon every \$100 bond. *Hunt v. Fawcett*, 8 Wash. 396, 36 Pac. 318; *Delafield v. State*, 26 Wend. 192; *Village of Fort Edward v. Fish*, 156 N. Y. 363, 50 N. E. 973; *Jones Co. v. Board of Education of Mt. Vernon*, 30 App. Div. 429, 51 N. Y. Supp. 950; *People v. Miller*, 84 App. Div. 168, 82 N. Y. Supp. 623; *Whelen's Appeal*, 108 Pa. St. 162, 1 Atl. 88.

So far as authority has been called to our attention, the cases generally hold that, in these local improvement contracts providing for payments at certain times, the contractor is not entitled to interest for any period prior to the time of such payment. *Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786; *Booth v. Pittsburgh*, 154 Pa. St. 482, 25 Atl. 803; *Cratty v. Chicago*, 217 Ill. 453, 75 N. E. 343.

Respondents contend that the city, having voluntarily paid this interest, cannot now recover it back, and that the mistake, if any, was one of law and not of fact; citing cases like *Cincinnati v. Cincinnati Gaslight & Coke Co.*, 53 Ohio St. 278, 41 N. E. 239, to the effect that a payment made by reason of a wrongful construction of the terms of a contract is not made under a mistake of fact, but under a mistake of law, and if voluntarily made cannot be recovered back.

While it has been held that the rule that payments made under a mistake of law cannot be recovered back extends to a municipal corporation, there seems to be a distinction be-

tween the wrongful reading of the terms of a contract when the power of the city is not questioned, and a mistake of law as to the legal effect and scope of the contract where the power is lacking, and where it appears that payments have been made, not only unauthorized but in violation of law. So far as we know, this rule has never been applied to prevent recovery of money paid out by city officials without authority, or in violation of law. If, under the correct reading of the statute, the contractor must accept bonds at their par or face value, then the payment by the city of bonds at a discount, or of bonds with earned interest added as a premium, is a payment made without authority and in violation of law, and is in effect a void payment. Such a payment is not to be considered as one voluntarily made by the municipality itself, but as made by those assuming to act for it without authority, and does not estop the municipality from recovering such payment. *Heath v. Albroom*, 123 Iowa 559, 98 N. W. 619; *Ada County v. Gess*, 4 Idaho 611, 43 Pac. 71; *State v. Young*, 134 Iowa 505, 110 N. W. 292; *Bayne v. United States*, 93 U. S. 642; *City of Duluth v. McDonnell*, 61 Minn. 288, 63 N. W. 727; *County of Alleghany v. Grier*, 179 Pa. St. 639, 36 Atl. 353; *Commonwealth v. Haupt*, 10 Allen 38. Nor does the failure of the city to deduct the accrued interest at the time of the delivery of the bonds vest any right in the contractor to this accrued interest, or estop the city from asserting the unlawfulness of such procedure. *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063; *Million v. Soule*, 15 Wash. 261, 46 Pac. 234; *State ex rel. Spring Water Co. v. Monroe*, 40 Wash. 545, 82 Pac. 888; *Paul v. Seattle*, 40 Wash. 294, 82 Pac. 601.

In support of its contention that the payment of this accrued interest was a voluntary payment, and cannot now be recovered by the city, respondents cite *Seattle v. Stirrat*, 55 Wash. 560, 104 Pac. 834, 24 L. R. A. (N. S.) 1275. Without attempting to point them out, we think there are so many distinctions between that case and this that nothing there

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said should be accepted as preventing the city from asserting its right to recover this interest.

The next question to be determined is the effect of the judgment in the mandamus proceeding in which the city was directed to allow the respondent \$76,112.19 for the yardage in removing the dirt between the one to one and three-fourths to one slope.

The only matter determined in that proceeding was the right of the contractor to receive this additional yardage as a proper item or allowance under the contract. No other question was submitted to the court nor referred to in the pleadings. The contractor asserted his right to be allowed this added yardage as a proper allowance under the contract. The city denied it, and the judgment affirmed it. No one now questions that right, nor is anything here sought to be litigated which limits the extent or binding force of that decree. The claim of the city in this case is that, admitting the correctness of that decree that respondents are entitled to the additional yardage, the city cannot now be required to levy an assessment upon the property in the improvement district in the full amount allowed for that yardage because the respondents now have in their possession certain monies which they should of right apply upon such payment, and the city be directed to levy an assessment only for the remainder. If the city now desired to interpose matter by virtue of which it sought to lessen or defeat respondents' allowance for yardage, that decree would defeat such an attempt, as it in legal effect negatives any defense that might and should have been raised against respondents' then contention. Respondents, however, in that action did not seek an adjudication that the city should levy an assessment upon private property for the purpose of raising the full amount of their claim, nor did they in any way seek to litigate their right to such a direction. Not having done so, they cannot now, when for the first time they come into court and seek such relief, say that the city is, because of the former decree, debarred from set-

ting forth reasons why such relief should be denied. Respondents can hardly be heard to say that they are entitled to the relief now sought because they did not seek or obtain it in the former action, but the city is now precluded from asserting its claim against such relief because the former action was the proper one in which to litigate such claim.

We are, therefore, of the opinion that the lower court was in error in rejecting the offset offered by the city, and the judgment is reversed and the cause remanded with instructions to allow the offset in the sum of \$47,696.11; and for further proceedings in accordance with the views here expressed.

ELLIS, FULLERTON, and MAIN, JJ., concur.

[No. 11099. Department Two. July 24, 1913.]

L. SHORETT, *as Administrator etc., Respondent*, v. KRIST KNUDSEN *et al., Appellants*.¹

VENDOR AND PURCHASER—CONTRACT—FORFEITURE—WAIVER. The receipt by the vendor of all installments except the last one, some time after they became overdue, waives a provision making time of the essence of the contract.

SPECIFIC PERFORMANCE—DEFENSES—ASSIGNMENT. An assignment by the vendee of a land contract to secure or in payment of a physician's bill, does not defeat specific performance on behalf of the personal representatives of the deceased vendee, where the physician claimed nothing under the assignment but filed his bill with the administrator and took judgment for the amount due him.

WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEASED. In an action for specific performance, brought by the administrator of the vendee's estate, the defendant cannot testify that he informed the decedent that the contract was forfeited, in view of Rem. & Bal. Code, § 1211, excluding the testimony of a party as to transactions with the deceased.

VENDOR AND PURCHASER—CONTRACTS — FORFEITURE — WAIVER — DEMAND. After waiver of a provision that time was of the essence of a

¹Reported in 133 Pac. 1029.

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contract upon which all payments had been made except the last one, the vendor cannot declare a forfeiture until after demand and the lapse of a reasonable time.

SPECIFIC PERFORMANCE—DEFENSES—LACHES. Specific performance of a contract for the sale of land is not barred by laches, through mere lapse of time, where the vendee was in possession and paid taxes up to the time of his death.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered October 22, 1912, upon findings in favor of the plaintiff, in an action for specific performance. Affirmed.

Henry Gulliksen and Martin J. Lund, for appellants.

Shorett, McLaren & Shorett and F. A. Gilman, for respondent.

MORRIS, J.—Respondent brought this action to enforce the specific performance of a contract to purchase real estate in which the decedent is named as vendee. The contract was dated August 23, 1904. The price of the land was \$600, \$100 of which was paid in cash upon the execution of the contract, and the balance was to be paid in annual installments of \$100 each, with interest on deferred payments at seven per cent. These payments were not made as provided by the contract, but at the time of his death in January, 1912, the vendee had made all of the payments except the last. The deferred payments were made as follows: August 23, 1905, \$105; March 3, 1907, \$78; May 18, 1907, \$85; August 31, 1907, \$119; November 23, 1907, \$103.75. No objection seems to have been made to this method of payment, and while the contract provided that time should be of the essence, it is evident that the vendor waived this feature of it and accepted payments when convenient to the vendee.

Specific performance was resisted upon several grounds, it being pleaded that the vendee had assigned his interest in the contract to a third person; that the vendee had forfeited the contract; and that the action should be defeated because of

laches. The court ruled against each of these defenses, and granted judgment awarding specific performance, and the defendant appealed.

The chief assignments of error are addressed to the insufficiency of the evidence to sustain the decree, which was raised by appellant in various ways, and errors in the rejection of testimony. It is first suggested that the vendee had assigned his interest in the contract. Vendee had met with an accident about two years prior to his death, and just before his death he made out an assignment of his contract to the physician who had attended him and to whom he was largely indebted for medical attention. This physician was made a party defendant to this action but made no appearance and permitted default to be taken against him, thus barring any interest he might claim by virtue of his assignment. It is stated, however, in argument that this physician, as a matter of fact, claimed nothing under this assignment, but had filed his bill with the administrator for services rendered deceased. The judgment having wiped out any interest covered by the assignment, no more attention need be paid to that feature of the case.

It is next claimed that the vendee had forfeited the contract sometime in September, 1909. Appellant complains that the court erred in rejecting the evidence offered to sustain this plea; but as the evidence sought to be introduced consisted of personal transactions with the deceased, its rejection was proper. Rem. & Bal. Code, § 1211 (P. C. 81 § 1027). We think if appellant had been permitted to testify that he informed the decedent that the contract was forfeited, the facts shown would rule the case against him. He attempted to show that, some two years after the last payment was due, he demanded payment from the decedent and at the same time declared it forfeited. This he could not do notwithstanding time was of the essence of the contract. The vendor, by extending the time of the payment and by indulgence to the vendee in this regard, had waived this feature of

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the contract; and having done so, he could not thereafter declare a forfeiture until after a demand for payment and the lapse of a reasonable time. *Thomas v. McCue*, 19 Wash. 287, 53 Pac. 161; *Whiting v. Doughton*, 31 Wash. 327, 71 Pac. 1026; *Douglas v. Hambury*, 56 Wash. 63, 104 Pac. 1110, 134 Am. St. 1096; *Walker v. McMurchie*, 61 Wash. 489, 112 Pac. 500. It also appears that the vendee had remained in possession of the land up to his death in 1912, over two years subsequent to the claim of forfeiture, and had paid the taxes on the land. If the vendor had forfeited the contract and had regarded the land as his own subsequent to September, 1909, it would seem that he would have taken some steps to assert his right of possession; or at least, as an evidence of his claim of ownership, paid the taxes. But he did neither of these things, although he did pay the 1911 taxes after the commencement of this action. It therefore seems to us the lower court was abundantly justified in holding against a forfeiture. Appellant maintains that it is the law that a party in default cannot enforce his contract. Ordinarily this is true, but such a rule applies only where the party in default is seeking to enforce the contract and asserts rights thereunder against one who is not, by laches, estoppel or waiver, barred from insisting upon a strict enforcement of the terms of the contract; and it is never applied where, as here, the facts show a waiver of the default. Neither do we think the right of action is barred by laches. Decedent was in possession of the premises up to the time of his death, and the fact that he had paid all taxes due up to that time evidences his possession under a claim of right. Under these circumstances, mere lapse of time will not defeat a recovery. *Mudgett v. Clay*, 5 Wash. 103, 31 Pac. 424.

Judgment affirmed.

MAIN, ELLIS, and FULLERTON, JJ., concur.

[No. 11016. Department Two. July 24, 1913.]

MORRISON MILL COMPANY, *Respondent*, v. AMERICAN
MERCANTILE COMPANY, *Appellant*.¹

BROKERS—CONTRACTS—COMMISSIONS—EVIDENCE—SUFFICIENCY. The evidence fails to establish a contract to pay a broker's commissions on the sale of box shooks, where the broker could not show any specific agreement with the seller for the payment of commissions, nor any course of dealing from which a promise to pay could be clearly implied, the writings clearly negatived any such idea, and the contract rested entirely in a telephone conversation which was either disputed or misunderstood.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered February 6, 1912, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Shepard & Burkheimer and *Fletcher & Evans*, for appellant.

Hadley, Hadley & Abbott and *Grosscup & Morrow*, for respondent.

PER CURIAM—The respondent is engaged in the business manufacturing lumber, cross ties, box shooks, and other timber products, one of its principal manufacturing plants being in the city of Bellingham. In December of the year 1911 it sold and delivered to the appellant certain cross ties at agreed price, according to the respondent's measurement \$400.30. The appellant failed to pay for the ties at the expiration of the term of credit, and the respondent brought present action to recover the purchase price. The appellant, in answering the complaint, claimed an offset on account of certain defective ties, but admitted an indebtedness on account thereof in the sum of \$360. It also set up a counterclaim for certain brokerage commissions. It alleged that its price

¹Reported in 133 Pac. 1033.

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[No. 11016. Department Two. July 24, 1913.]

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MERCANTILE COMPANY, *Appellant*.¹

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Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered February 6, 1912, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Shepard & Burkheimer and *Fletcher & Evans*, for appellant.

Hadley, Hadley & Abbott and *Grosscup & Morrow*, for respondent.

PER CURIAM—The respondent is engaged in the business of manufacturing lumber, cross ties, box shooks, and other timber products, one of its principal manufacturing plants being in the city of Bellingham. In December of the year 1910, it sold and delivered to the appellant certain cross ties at the agreed price, according to the respondent's measurements, of \$400.30. The appellant failed to pay for the ties at the expiration of the term of credit, and the respondent brought the present action to recover the purchase price. The appellant, answering the complaint, claimed an offset on account of certain defective ties, but admitted an indebtedness on account thereof in the sum of \$360. It also set up a counterclaim for certain brokerage commissions. It alleged that its principal

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business was that of a broker buying and selling goods and supplies on commission; that it found a customer desirous of purchasing a large quantity of hemlock box shooks out of which to make oil cases or coverings, and that he communicated the fact to one Goff, who was doing a brokerage business at Seattle, Washington, under the name of Washington-Canadian Lumber Company, and requested him to find a manufacturer who would furnish the shooks on such terms as would allow a brokerage commission, which commission it agreed to divide with Goff; that Goff opened negotiations with the respondent to supply the shooks which resulted in an agreement between the respondent and Goff by which the respondent agreed to quote such prices to the appellant's customer as would enable it to pay a commission to Goff of one-half cent per case for all shooks it should be able to sell such customer; that Goff thereupon advised the respondent of the name of the customer, and the respondent thereupon entered into a contract with such customer for the sale of, and did sell to such customer, a large number of shooks for oil cases, on which commissions were due the appellant—the precise amount it was unable to state. An accounting was asked, and judgment prayed for such sum as might be found due upon the accounting. In reply the respondent conceded the offset claimed on account of the defective ties, but denied all of the allegations concerning the claim for commission. A trial was had on the issues made by the answer and reply, before the court sitting without a jury, and resulted in a judgment in favor of the respondent for the sum conceded to be due for the cross ties, and denying recovery on the claim for commission. This appeal followed.

The controversy in this court, as it was in the court below, is over the claim for commissions. The evidence is somewhat voluminous, and it would serve no useful purpose to detail it at length here. Outlined, the evidence tended to show that the Asiatic Petroleum Company, whose purchasing agent resided at Tacoma, desired to purchase a large quantity of

hemlock shooks out of which to make cases or containers for casing cans of petroleum oil which it sold to its Asiatic trade. One Dorr, the secretary of the appellant, learned of this fact, and called on the agent of the oil company, and asked if he as such agent was willing to receive offers for box shooks, saying he could do better than could the agent in making purchases. The agent replied that he would receive such offers, whereupon Dorr, communicated with the Mr. Goff, mentioned in the answer, and requested him to find a manufacturer who would furnish the shooks on such terms as would allow a broker's commission on such sales as might be made to the oil company, agreeing to divide any commission that could be thus obtained equally with Goff. Goff, corresponding under his trade-name of Washington-Canadian Lumber Company, requested quotations from the respondent for shooks delivered at Seattle suitable for the purpose desired. After some correspondence looking to further details, the respondent quoted him a price of ten and one-half cents per case. Goff demurred to this as being too high, saying it would "take a price of nine cents less two and one-half per cent," to handle the matter. Some further negotiations were had, when the respondent offered him a price of nine cents per case net to it at its mill in Bellingham. In none of the correspondence up to this time did Goff disclose his interest in the transaction, or the fact that he was acting for another. He used, as we say, his trade-name and led the respondent to believe that his purported company was the person desiring the shooks. While Goff was endeavoring to get quotations from the respondent, the purchasing agent of the oil company was pressing Dorr for a quotation on shooks, and was quoted a price of nine and one-half cents per case, delivered at the respondent's mill in Bellingham. He demanded a confirmatory report from the mill company itself as to the price, which led Dorr to request Goff to procure such a report. Goff agreed to get such a report and inquired of Dorr for information as to whom the letter should

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be addressed. Dorr answered giving the purchasing agent's name and address, accompanying his answer with a caution to the effect that "it would greatly assist in this business if the buyer can go direct to the supplier, and you to provide for your own and our commission by separate agreement, and then the buyer will not know that any commission is being paid, and will be better satisfied."

Goff then again took up the question of prices with the respondent, inquiring if it could not "furnish hemlock shooks at eight and one quarter cents f. o. b. cars at Bellingham." This telegram the appellant answered by letter, saying that they would not take less than nine cents net at their mill. On the next day Goff learned that the prospective buyer was intending to visit the mill company, and thereupon wired them of that fact, and made a request that the respondent quote him a price that "will allow us a commission of two and one half per cent."

On the next day, Goff called the respondent on the telephone, and made a similar request orally. What answer the manager of the respondent made is a subject of dispute between the parties. Goff testifies that in this conversation the manager agreed to quote such prices to the intended purchaser's agent as would allow him (Goff) a commission of one-half cent per case on all shooks sold such purchaser. The manager of the mill company directly contradicts these statements. He testified that he positively refused to allow commissions; that he told Goff that it was not their custom to deal through brokers; that their prices were net to them at the mill, and any commission he received must be from the purchaser; testifying further that the telegram of the day before was the first time that the respondent had any information that Goff, or rather the Washington-Canadian Lumber Company in which name the correspondence was carried on, was a broker and not a prospective purchaser. The next day (November 3, 1910) letters passed between the parties pur-

porting to be confirmatory of their respective versions of the telephone conversation.

The order of the succeeding events are not made very clear in the record; but on the same day the purchaser's agent wrote Goff, addressing him as the Washington-Canadian Lumber Company, saying, among other things, that,

"Mr. Joseph K. Dorr has had the question up with me for the last 14 days to supply him with box shooks of hemlock and spruce and especially hemlock from Morrison mill in Bellingham. I have been after him every day since to get a letter so I have it in black and white what you have got to offer. I was therefore kind of surprised this morning to receive your letter of yesterday in which you quoted him white pine to the extent of 30,000 cases at \$13.25, without quoting him for hemlock. I have agreed with Mr. Dorr that I should telephone long distance to Morrison Mill Company and mention your name. I have got quotations from them and I shall go there tomorrow. As I understand you are the broker in this case I think it would be advisable for you when you receive this letter to telephone them, or write them that you have been the broker in this case, as it is not my intention to beat you out of any brokerage, but the business I do must be done so everything is clear."

On his way to Bellingham, the agent called on Goff personally, and in the course of his conversation with him told him that he had quotations from the respondent offering the shooks at nine cents a case. He testified that Goff told him this was a mistake; that the price was nine and one-half cents, and that he was the agent for the Morrison Mill Company. After he had started on his way, Goff again wired the respondent the following:

"Seattle, Wash., Nov. 3rd, 1910.

"Morrison Mill Co., Bellingham, Wash.

"Mr. Blaauw states he is afraid there may be some misunderstanding in reference to the price as you stated to him over telephone this morning something about a nine cent price. He wants a nine and one-half cent price quoted him on cars Bellingham and understood either he or us will be credited with one-half cent per case commission leaving you nine

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cents net. He will await his departure for Bellingham until you confirm this. As regards delivery etc. he will take chance on coming up to make satisfactory arrangements. In wiring reply might be well to state how many could ship this month and next provided you took contract.

“Washington-Canadian Lumber Co.”

In answer to this, the respondent replied: “No misunderstanding about price. Can furnish twenty thousand this month and more next.”

The agent reached Bellingham on the same evening, and on the next day entered into a trial order for a limited number of shooks of a better grade than those contemplated at the nine cent offer, and for an increased price. Subsequently the order was renewed, and a large quantity of shooks sold the purchaser.

On November 9, 1910, Goff by letter notified the respondent that he would hold it for commission at one half cent per case for all shooks sold the Asiatic Petroleum Company. The respondent answered immediately on the receipt of the letter denying its liability for commissions.

It seems to us that there is nothing in the evidence that justifies a recovery on the part of the appellant of the commissions claimed. Before a broker can recover a commission from a seller on account of a sale of any property or commodity, he must have a specific agreement with the seller for the payment of such commission, or the course of dealing must have been such as will clearly imply a promise to pay commissions. Here there is clearly no promise made in writing to pay a commission. Indeed, the writings—and the greater part of the negotiations between the parties were had by writings—clearly negative any such idea. The promise must rest in the telephone conversation, but the conduct of the respondent with regard to the transaction, both prior and subsequent to that time, plainly indicates that it did not so understand the conversation, though we may believe that the other party to the conversation so understood it. If both are

truthful, there was no meeting of minds upon the proposition, and hence no contract. If one is falsifying, it is better that we adopt the conclusion the trial court reached from the evidence, since the truth rests entirely on the veracity of the witnesses who testified orally before that tribunal, than substitute our own judgment gathered from the printed record.

The judgment is affirmed.

[No. 11044. Department Two. July 26, 1913.]

IRENE BEERS, *Appellant*, v. FRED E. BEERS, *Respondent*.¹

DIVORCE—CUSTODY OF CHILDREN—DECREE—MODIFICATION. The superior court has power to modify a decree of divorce with reference to the custody of minor children, where there is a material change in the conditions or fitness of the parties, or their welfare would be promoted thereby.

DIVORCE—ALIMONY—DECREE—MODIFICATION. As to alimony yet to accrue, the superior court may modify a decree of divorce as the conditions or circumstances of the parties may change from time to time; but it has no power to modify the decree as to installments of alimony past due and unpaid.

SAME—PETITION FOR MODIFICATION—DEMURRER. A petition to modify a decree of divorce as to the custody of children is sufficient on demurrer to authorize the relief sought, when it appears that the welfare of the children would be promoted thereby.

Appeal from a judgment of the superior court for King county, Ronald, J., entered January 6, 1913, in favor of the defendant, granting a petition to modify a decree of divorce, upon overruling a demurrer thereto. Modified.

Geo. W. Saulsberry, for appellant.

Gay & Olson (Milo A. Root, of counsel), for respondent.

MAIN, J.—The purpose of this proceeding is to modify a decree of divorce.

¹Reported in 133 Pac. 605.

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Opinion Per MAIN, J.

On April 10, 1909, the superior court for King county entered a decree granting to the plaintiff an absolute divorce from the defendant and awarding to the plaintiff the care and custody of their two minor children, Gladys Irene and Evelyn. The decree also provided that the defendant pay to the plaintiff, for the use and benefit of the children, the sum of \$15, each and every month until the further order of the court, \$100 as an attorney's fee for plaintiff's attorney, to be paid in installments of \$20 per month, and costs of the action. The right to modify or change the decree with reference to the allowance or custody of the children was reserved by the court in the decree.

Thereafter, during the month of October, 1912, the defendant filed a petition seeking to have the decree modified with respect to the payment of alimony and the custody of the children. From this petition, it appears that the decree, so far as the payment of alimony, attorney's fee, and costs are concerned, has never been complied with by the defendant. The portions of the petition material to this inquiry are, in substance, as follows: That the plaintiff has practically abandoned her two minor children; that Gladys Irene is being carried about the country by plaintiff's sister and her husband, traveling vaudeville actors of Chicago, Illinois; that Evelyn is kept in the home of the plaintiff's father, at Bryn Mawr, in King county, who is living with a woman not his wife; that the child is falsely taught as to her correct name; that, at the trial of the divorce proceeding, plaintiff upon oath falsely represented that she had rich friends and relatives who would assist her in the education, maintenance, and support of the minor children; that the plaintiff is not now a fit and suitable person longer to have their care, custody, and control; that defendant now has employment in King county, lives with his father and mother at Bryn Mawr, and that his mother is in the best of health; that their home is comfortable and the minor children can be given the education and every comfort and advantage that children of their age and circum-

stances should have. To this petition, a general demurrer was interposed which, on December 24, 1912, was by the court overruled. The plaintiff elected to stand on the demurrer, and refused to plead further. Thereupon judgment was entered modifying the decree and adjudging that the defendant be relieved and discharged from the payment of alimony, including that already accrued and unpaid and that which would accrue in the future. It was further decreed that the custody of the children be taken from the plaintiff and given to the defendant. From this judgment, the plaintiff has appealed.

Upon this appeal the questions presented are the right or power of the court to modify the decree, (1) as to the custody of the children; (2) as to alimony yet to accrue; and (3) as to alimony past due.

I. The law in this state is well settled that, where there is a material change in the conditions or fitness of the parties, or the welfare of the children would be promoted thereby, the court has the power to modify the decree with reference to the custody of the minor children. *Koontz v. Koontz*, 25 Wash. 336, 65 Pac. 546; *Irving v. Irving*, 26 Wash. 122, 66 Pac. 123; *Kane v. Miller*, 40 Wash. 125, 82 Pac. 177. The appellant's demurrer admits all the facts as alleged in the petition which are well pleaded. Assuming, then, that the facts are as stated in the petition, the welfare of the children would be better served at the present time by awarding their custody to the father. On this branch of the case the facts stated in the petition were sufficient upon demurrer to entitle the respondent to the relief sought.

II. As to the alimony yet to accrue, the law reposes in the court the power to modify the decree as the conditions and circumstances of the parties may change from time to time. *Poland v. Poland*, 63 Wash. 597, 116 Pac. 2; *Dyer v. Dyer*, 65 Wash. 535, 118 Pac. 634; *Harris v. Harris*, 71 Wash. 307, 128 Pac. 673. The appellant in her brief does not appear to seriously contend that the law is otherwise

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than as above stated as affecting the custody of the children and alimony yet to accrue.

III. On the question of the power of the court to modify the decree as to those installments of alimony past due and unpaid, the law appears to be that such power does not exist. The rights and liabilities of the parties with reference to such installments become absolute and fixed at the time provided in the decree for their payment, and as to such the decree is not subject to modification. In *Craig v. Craig*, 163 Ill. 176, 45 N. E. 153, it is said:

“In the case at bar it was error to set aside and cancel alimony which had already accrued and was due to plaintiff in error under the decree. The amount of such alimony was a debt due from the defendant James R. Craig to the beneficiary in the decree, and the latter had a vested property right therein, which the court was not authorized to take away from her.”

In *Harris v. Harris*, *supra*, speaking upon the same question, it was said:

“The only final feature of judgments of this character is as to each installment of alimony as it becomes due. As to these installments, the rights and liabilities of the parties become absolute and fixed at the time provided in the decree for their payment, and to this extent the judgment is a final one.”

It was error, therefore, for the court to modify the decree as to the installments of alimony which had accrued at the time of the hearing, and to this extent the judgment must be modified by excepting from its operation the alimony already accrued.

The cause will be remanded to the superior court with direction to modify the judgment as herein indicated.

ELLIS, FULLERTON, and MORRIS, JJ., concur.

[No. 11254. Department One. July 26, 1913.]

**WILLIAM HAGEN *et al.*, Respondents, v. BOLCOM MILLS,
Appellant.¹**

MUNICIPAL CORPORATIONS — STREETS—VACATION — EFFECT—NOTICE. An order of vacation of streets being a public record, is in legal effect an amendment of the plat and subsequent purchasers take with notice thereof.

SAME—VACATION—TITLE. Under Rem. & Bal. Code, § 7846, providing that on the vacation of a street, the same shall be attached to the lots bordering thereon, and that title shall vest in the persons owning the property on each side thereof in equal parts, title to a vacated street passes in fee simple to one owning all the land on both sides of the street.

SAME—TITLE TO VACATED STREETS—STATUS AS DISTINCT TRACT—DEED OF ABUTTING LOTS—EFFECT. Where, by the vacation of a street, the owner of all the land on both sides of the street acquired the title to the street, and conveyed the whole property describing the street as a distinct parcel, its future status as such is fixed, and the conveyance is notice to all subsequent grantees in the chain of title that the street is to be treated as a separate tract which does not pass by a subsequent conveyance of abutting lots; since the owner could fix its status and convey it apart from the lots, land is not appurtenant to land, and subsequent purchasers do not buy with reference to a platted street where there is none at the time of their purchase.

APPEAL—REVIEW—RECORD — EXCEPTIONS — DECREE WITHOUT FINDINGS. In an equity case, in which no findings are made, a general exception to the decree is sufficient to obtain a review of the evidence, under Rem. & Bal. Code, § 382, providing that it shall not be necessary to take an exception to any ruling or decision which is embodied in a written judgment, order or journal entry, except findings of fact etc.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered October 19, 1912, upon findings in favor of the plaintiff, in an action to quiet title. Reversed.

Myers & Johnstone, for appellant.

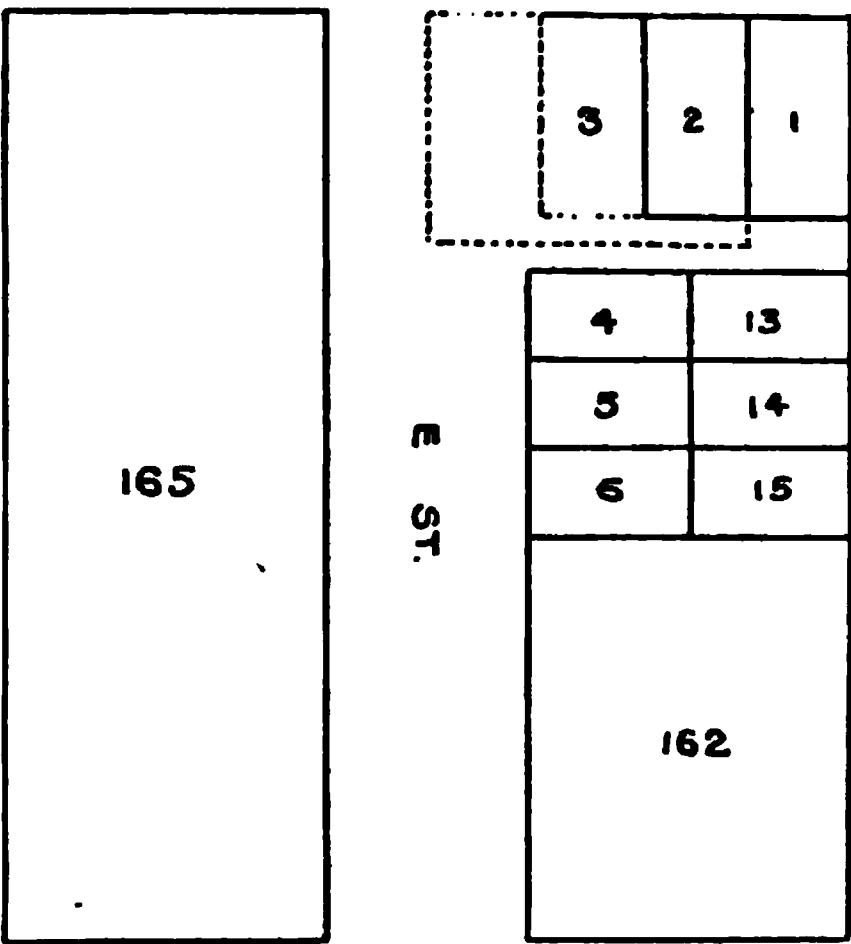
Carkeek, McDonald & Kapp and *William S. Bell*, for respondents.

¹Reported in 133 Pac. 1000; 134 Pac. 1051.

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Opinion Per CHADWICK, J.

CHADWICK, J.—The parties to this action are contending over the ownership of a vacated street lying between lot 3, in block 162 and block 165, in Gilman Park addition to the city of Seattle. That our statement of the facts may be the better understood, we have caused a plat to be reproduced for present reference.



Blocks 162 and 165 were acquired by the Seattle Iron & Steel Manufacturing Company, a corporation, on the 27th day of August, 1889.

On the 7th day of October, 1889, the county commissioners of King county granted the petition of the Seattle Iron & Steel Manufacturing Company, and by an order then entered, vacated all of the alleys in certain blocks owned by the steel company, including blocks 162 and 165, and also ordered “that so much of ‘E’ street in Gilman Park as lies between said blocks 162 and 165, that is to say, so much of ‘E’ street as lies between the west boundary line of First avenue east and the east boundary of Railroad avenue in said Gilman Park be, and the same is hereby vacated, and hereafter ceases to be a public street.”

The law governing vacations of streets at the time this order was entered, was the original act passed in 1858, with possibly some minor amendments, which has been carried into Rem. & Bal. Code as § 7846 (P. C. 77 § 1013).

On February 1, 1900, the steel company conveyed to Lester Turner "blocks . . . 162, 165 . . . and that portion of what was formerly platted as public streets lying between said blocks as follows, to wit: . . . of 'E' street between blocks 162 and 165 . . . " On June 13, 1902, the steel company quitclaimed to Turner "the land platted as alleyways through blocks . . . 162, 165 . . . " On February 25, 1905, Lester Turner conveyed lots two and three, block 162, to C. E. Lawson. Lawson conveyed to one Dahlberg. In these conveyances, the property is described as lots two and three, in block 162. No mention is made of the vacated street.

On July 3, 1905, Turner conveyed to defendants' predecessor all of block 165, and "the alleyway running through said block, heretofore platted, but now vacated." On December 24, 1906, Turner deeded to defendant certain lots in block 162, "and that portion of 'E' street (vacated) lying between blocks 162 and 165," and on November 20, 1908, by like conveyance, the "vacated alley in block 162." On December 22, 1911, Dahlberg conveyed lots two and three in block 162 to Hagen, the plaintiff. On March 11, 1912, Turner gave Hagen an option to purchase "that portion of 'E' street lying south of lot three (3), block 162 . . . and contiguous to said lot three (3)."

Defendant has used, and has put some improvements in the way of a lumber shed on, the disputed property. Plaintiff and his predecessors have, since 1905, paid taxes on lots 2 and 3 "with portion of vacated alley and 'E' street;" and defendant has paid taxes on block 165 and "vacated alley and vacated 'E' street adjoining."

Plaintiff prayed for a recovery of the possession of the disputed land; for the value of the rents and profits for the

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time the property has been occupied by the defendant; and for general relief. From a decree quieting title in plaintiff, defendant has appealed.

Respondent relies on the statutes, Rem. & Bal. Code, § 7842 (P. C. 77 § 1185), and upon certain decisions of this court, to sustain the decree. The statute, which is the act of 1901, is as follows:

“When any street, alley or public way in any incorporated city or town in this state has heretofore been or may hereafter be vacated by the council or legislative body of said city or town, the property within the limits of any such street, alley or public way so vacated shall belong to the abutting property owners, one-half to each, unless within six months after the taking effect of this act, any person or corporation, who may feel himself or itself aggrieved by such a division, may commence an action in the proper courts of this state to determine the title to any such street, alley or public way so vacated.” Laws 1901, p. 176, § 3.

And the decisions are: *Norton v. Gross*, 52 Wash. 341, 100 Pac. 734; *Rowe v. James*, 71 Wash. 267, 128 Pac. 539; *Burmeister v. Howard*, 1 Wash. Ter. 207; and *Milton v. Crawford*, 65 Wash. 145, 118 Pac. 32. These cases recognize the general rule that, upon the vacation of a street or alley, the land thus relieved of the public easement therein becomes attached to, and passed by deed under a description of the abutting property. We shall refer to them later in this opinion. The general rule is qualified when the circumstances of the particular case demand it; as, for instance, if the conduct of the parties and their intent as manifested in the deeds or other instruments occurring in the chain of title show that the property has not been treated as a part of the abutting lots.

The reversion in the present case occurred under § 7846 of the code. This section, and the others attending it, were held to be repealed by the act of 1901, which we have quoted above, in *Rowe v. James*, *supra*, but that act expressly pro-

vided that "No vested rights shall be affected by the provisions of this act." Laws 1901, p. 176, § 4.

Rem. & Bal. Code, § 7846 (P. C. 77 § 1013), is as follows:

"The part so vacated, if it be a lot or lots, shall vest in the rightful owner, who may have the title thereof according to law; and if the same be a street or alley, the same shall be attached to the lots or ground bordering on such street or alley; and all right or title thereto shall vest in the person or persons owning the property on each side thereof, in equal proportions: *Provided*, The lots or grounds so bordering on such street or alley have been sold by the original owner or owners of the soil; if, however, said original owner or owners possess such title to the lots or ground bordering said street or alley on one side only, the title to the same shall vest in the said owner or owners if the said court shall judge the same to be just and proper."

The order of vacation of the streets in Gilman Park, being a public record, was in legal effect an amendment of the plat, and all who bought thereafter took with notice of the change. All of the land on both sides of the street being in one ownership, the title to the vacated street passed in fee simple.

"A conveyance according to a plat is a conveyance by recorded metes and bounds, except where the lots front on a street. . . . The metes and bounds on the plat, it is conceded, would have been sufficient if the lot had been in the center, instead of the corner of the block. That was the legal situation when the street was vacated." *White v. Jefferson*, 110 Minn. 276, 124 N. W. 373, 125 N. W. 262, 32 L. R. A. (N. S.) 778.

The reason supporting title to vacated streets by reversion to abutting owners is, that the law will presume that they have paid an enhanced value therefor in consequence of the prospective use of the street.

"The proprietor of premises platted as a town site, by reason of dedicating a part for use as streets, enhances the value of the lots to which access may be had by means of such streets. His grantees pay this enhanced value, and the proprietor thus receives a consideration, not only for the pre-

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cise amount of land described in each lot, but, also, that embraced in the streets upon which the lots abut; and he who has already been once paid for his land cannot, in equity, be heard to assert title thereto as against one who has paid him the consideration therefor." *Olin v. Denver & R. G. R. Co.*, 25 Colo. 177, 53 Pac. 454.

"Easements of this character may cease to exist, like all other burdens upon land, and when they do the land is freed from the encumbrance as completely as though it had never existed, and the owner of the soil has an absolute title to the same. Angell on Highways, Sec. 326, says: 'From the principles already declared it necessarily results that when the public easement is relinquished or vacated, the owner of the soil is restored to his original dominion over the same.' " *Benham v. Potter*, 52 Conn. 248.

At the time the street was vacated, the steel company was the sole owner of blocks 162 and 165, and became the owner of the intervening vacated space called "E" street. Unquestionably the common owner could have conveyed that space without reference to the adjoining lots, just as an abutting owner could convey the reverted one-half of the street apart from the lot. To hold otherwise would be to hold that a reverted street could never be conveyed except as a part of an abutting lot. Instead of conveying the vacated street alone, the steel company conveyed the whole property, not by lots and blocks, but with an apt description of the vacated property, thus injecting into the chain of title, common to both parties to this suit, a notice that the owner treated the vacated property as a separate quantity of land. Turner, by like conveyance, deeded the vacated land to the defendant. His deed to plaintiff purported to convey lots two and three in block 162. It cannot be held that plaintiff bought with reference to a platted street because there was no such street at the time he or any of his immediate grantors bought the property.

White v. Jefferson, to which we have referred, is a case in many respects like the one at bar. There had been a vacation of a street before the lots, which it was insisted carried the

vacated street, had been sold. Mr. Justice Jaggard, after stating the general rule of reversion, said:

“It is true that in cases presenting the question whether a grant according to a recorded plat of premises abutting on a street conveyed only the land described in the plat by metes and bounds, or also the fee to the middle of the street subject to easement of public use, the opinions of the courts have often contained utterances to the effect that the fee title to the middle of the street was a necessary or integral part of the lot indicated by the plat; that interest was part and parcel of the lot conveyed; that the center line of the street is a boundary line of abutting lots; that the grantor is estopped from denying a conveyance of the fee subject to the easement, and the like. Such general statements must, of course, be limited to the particular facts involved, and are not at all inconsistent with the application of another rule to a substantially different state of facts. Where the street had been vacated before the granting, are the facts substantially different? The rule in such a case can be determined only by a consideration of relevant principles. . . .

“The owner of the land platted usually becomes entirely disassociated with the title to the land sold and has neither a proximate interest in nor a practical use for the qualified fee in the street. The interest of the vendee therein is immediate. It has direct and substantial value to him. Indeed, as Cole, J., said in *Kimball v. City*, 4 WIS. 321, 331, the lots would be ‘comparatively useless’ without the implication of conveyance to the middle of the street. He is logically entitled to improve the property as he chooses. It conduces to the best use of the premises to allow him to do so in reliance on access to the street on the ground itself and for light and air above. So long as the land is used as a street these rights would be protected, irrespective of who owned the fee. But upon vacation of the street these rights would be legally destroyed unless the vendee had the fee. It is much more reasonable to vest that fee in him than in the usually remote party who originally platted the land. To allow the vendor to retain the fee would be a serious embarrassment to alienation and improvement of property which it consists with public policy to favor. . . .

“Where, however, the street has been vacated while the original proprietor owns the lots in question, the situation

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is substantially different. On vacation of a street in a case like the one at bar, he owns lots 23 and 24 and the space between in fee simple. He can transfer the whole tract, or any part of it, or transfer lot 23 to any person, and lot 24 to another person, and the space between the two to a third person. It is immaterial in what order of time such transfers were made. If the strip was granted before the lots, the intention would be certain; if afterwards, equally clear. What had been a street would be mere land. It would be taxable as land and so descend. Its transfer would be subject to the appropriate section of the statute of frauds. That it was not numbered nor properly named on the plat would be wholly insignificant. The case would be the same as if no street had ever existed, and, instead of being designated as 'street,' the tract had been marked 'sand hole,' or 'mound,' or any other name, or had had no name. The land which had been a street assumed exactly the same legal status as any other land which had not been impressed with a public easement. There is neither mystery nor magic in the word 'street.' The easement of use is the significant fact.

"When the easement ceases, there is no occasion nor justification for any imputation of intention. The parties would contract with reference to a record showing that no street existed, where the vacation proceedings are required to be recorded. Neither alienation nor improvement would be jeopardized by selling lots without the strip; merely less land would be sold to any one person. What had been a possible creator of local improvement assessments would become a possible subject of such public charge. When the reason for the rule ceases, the rule itself should cease. The courts do not indulge in unnecessary, artificial assumptions, nor make new contracts for parties who have definitely agreed upon its terms. This they would do if in such cases they should construe a deed to pass title to a parcel of land distinct and different from what that contract accurately described.

"In the instant case, before the transfer to either plaintiff or defendants, there were on record in the office of the register of deeds two recorded plats of this addition, namely, the plat originally filed and the plat required to be there filed, together with a transcript of the resolution canceling and vacating the street, which was required by section 117, pp. 24, 25 (3d ed.) charter of St. Paul, as a necessary condi-

tion to the validity of the ordinance. And it is here stipulated that the ordinance was valid. The defendants, therefore, had notice that there was no La Salle street, and contracted with reference to a record showing that the strip did not adjoin a street."

The learned justice then reviews the authorities, from which he extracted the governing principle in this class of cases, "That land is never appurtenant to land;" or, as we may put it, a fee may carry an easement or a lesser estate as an incident or an accretion, but the conveyance of the fee simple title to one piece of land will not carry as an incident or an accretion a fee of equal or greater degree and quality.

Brown v. Taber, 103 Iowa 1, 72 N. W. 416, is a case in point. The dedication of streets under the Iowa statute vested the fee in the public, and had the dedication in that case been accepted, the general rule would have been applied. The case involved the title to a vacated street, and the court found that the dedication had not been accepted, and applied the principle to which we have adverted. There, as here, the original owner had made a conveyance to a first vendee of certain lots, and a later conveyance to a second vendee of lots including the vacated street. The court held that a conveyance of the lots did not include the vacated street, saying:

"The only effect of vacating [the street] was to withdraw it from the public use. In the words of Lowe, C. J., in *Milburn v. City of Cedar Rapids*, 12 Iowa, 246: The lots are 'designated by numbers, and it is simply by these numbers that they are conveyed, as they are known to represent the particular lot, with its specific boundary as represented on the map. Under such circumstances there is no room to indulge in the presumption that the purchaser takes any more land than is contained within the defined lines of the lot.' Referring to the lots by number in the deed, had the effect identical with describing them by metes and bounds as delineated on the plat. Their boundary lines were those of the vacated street, and the deed conveyed to King only the land included within such lines. See *Chicago Lumber Co. v. Des Moines Driving Park*, 97 Iowa, 25; *Burbach v. Schweinler*, 56 Wis.

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386 (14 N. W. Rep. 449). As the vacated street was a distinct parcel of land, it seems hardly necessary to say that it did not pass as incident or appurtenant to the lots. *Jackson v. Hathaway*, 8 Am. Dec. 263; *Mendel v. Whiting*, (Ill. Sup.) 31 N. E. Rep. 431; *Harris v. Elliott*, 10 Pet. 25; *O'Linda v. Lothrop*, 21 Pick. 296; *Ammindown v. Bank*, 8 Allen, 285."

In *Overland Machinery Co. v. Alpenfels*, 30 Colo. 163, 69 Pac. 574, the court said:

"Much argument, pro and con, is devoted to the proposition that a deed describing property by lot and block number operates as a conveyance of contiguous property which was at one time, but is no longer, included within the limits of a public street. . . . That the original owner who has the fee both in the streets and lots abutting thereon has the right to retain his estate in the former when he sells the latter, that he may separate the two estates or titles, and treat them as distinct and separate tracts or parcels, is too clear for argument. *Jackson v. Hathaway*, 15 Johnson 447. . . . Let us then carefully look to the language of the description in the deed of March 17, 1871, from Ebert to Case. Ebert then owned all of block 12 and all of Depot street opposite the same. The deed reads: 'All block numbered twelve (12) in Case and Ebert's Addition to the City of Denver; also doth quitclaim all title in being and reversion, to the land now occupied by Depot street . . . lying contiguous to and adjoining said block.' Clearly, then Ebert treated block 12 and Depot street as separate and distinct tracts and by the conveyance of block 12 did not intend to extend the grant so as to include any part of the adjacent street. For, after conveying the block by reference to its number as shown on the recorded plat, he quitclaims all title to the 'land now occupied by Depot street . . . lying contiguous to and adjoining said block.' We must not disregard this additional description as surplusage; on the contrary, we are bound to assume, if we can, that the parties meant something by it. If, as contended by the plaintiffs, by this deed Ebert intended to convey to Case the portion of Depot street contiguous to block 12 as appurtenant to, or as part of, that block, he would have stopped after describing block 12; but by the use of the word 'also,' which, in a case of this sort, means something in addition to that previously described,

he proceeds to include in the grant something not theretofore embraced in a previous description. And when he adds Depot street to the grant he says, in effect, that he intends to pass a parcel of land distinct and different from what he has already described. Devlin on Deeds, § 864; *Panton v. Tefft*, 22 Ills. 366, 375-6. Not only Ebert, as grantor, was bound by this description; so, also, was Case, as grantee. Both of them, the grantor in conveying, and the grantee in accepting, the deed, must have intended that the conveyance of block 12 by its appropriate number with reference to the plat extended only to the nearest side, and not to the center, of Depot street, and by describing with particularity as one of the parcels of the grant that portion of Depot street lying adjacent to block 12 the parties intended to include such portion as a separate and distinct parcel. It is this deed which, in our judgment, clearly shows the intention of the parties to restrict block 12 to the southeasterly side of Depot street. . . .

“Indeed, when once there has been a conveyance excluding a highway from the grant, as was done by Ebert in his deed to Case, neither Case nor any subsequent grantee can include it, for he would be conveying something as a part of the specific thing granted which was distinct from it. 4 Enc. of Law (2d ed.), 817.

“Case, then, in 1878, being the owner of all block 12 and also the title of Depot street adjacent thereto certainly had the right to continue as separate the two titles and two tracts of ground which he held, just as Ebert did when title passed from him to Case. The parties concerned, therefore, having severed the two estates, having by their deed in effect manifested their intention to vacate Depot street and having limited block 12 to the southeasterly side of that street, it was beyond the power of their subsequent grantees to reunite them in one tract, or to convey the street as appurtenant to the lots in the block, without the consent of all parties concerned.”

In *Plumer v. Johnston*, 63 Mich. 165, 29 N. W. 687, the court said:

“The doctrine is well established that the grantee of a lot bounded upon a street or other highway takes to the center of such street, subject only to the public easement, unless some-

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thing appears upon the plat, or in the terms of the conveyance, excluding the title from passing under a boundary so described. But this doctrine is limited, and is applied to actual highways, and not to mere paper highways. *Hopkinson v. McKnight*, 31 N. J. L. 422."

In *Sanchez v. Grace Methodist Episcopal Church*, 114 Cal. 295, 46 Pac. 2, the court raised the question relied on by respondent, saying:

"A more serious question is whether the land in Messer's lane to the middle of it did not become, when the lane was vacated, by a sort of accretion, parcel of the abutting lots so as to pass with them by the deed to Leonis without further designation. (See *Challis v. Depot etc. Co.*, 45 Kan. 398; *Atchison etc R. R. Co. v. Patch*, 28 Kan, 470—cases turning upon a peculiar statute.) We think no such rule can obtain in this case; the conveyance of land bounded by a highway is presumed to carry title to the median line of the way, but there is no reason in a like presumption to include land which has formed, but forms no longer, part of a highway; in 1875, when the deed was made to Leonis, the soil of the former lane, together with the strip off the Mott & Johnson tract, formed a body of land some seventy feet in width lying between lots 23, 24 and First street, and wholly free from the legal incidents which pertain to the soil of a highway; there is, therefore, no more reason to say that any part thereof passed under the designation of those lots in the deed than for extending the scope of that description to adjacent land—if such there had been—which never was impressed with the highway use; more especially since neither party claims that plaintiff owned the fee in any part of said lane before its vacation as a highway. (*Harris v. Elliott*, 10 Pet. 25, 54.)"

Nothing will be gained by pursuing the authorities. Under a similar state of facts, it is uniformly held that deeds are controlled by the intent of the parties, as expressed therein and that subsequent grantees are bound by the patent intent of the common grantor.

We find that "E" street, by the process of vacation, became a separate tract, and the property of the owner of the blocks 162 and 165. [Rem. & Bal. Code, § 7846 (P. C. 77

§ 1013)]; that its future status depended upon the attitude of its then owner; that it was conveyed as a distinct parcel; and that such conveyance was notice to all subsequent grantees in the chain of title.

“The original owner who lays out an addition to a city and has the fee both in the streets and the abutting lots, may separate the two estates or titles and treat them as distinct and separate tracts or parcels. He may sell the lots and retain his estate in the adjacent street.” Syllabus to *Overland Machinery Co. v. Alpenfels*, 30 Colo. 163, 69 Pac. 574.

See, also, 4 Am. & Eng. Ency. Law 817.

Nor has this court held to the contrary of the doctrine here announced. The exact question has never been before the court. The case of *Norton v. Gross*, *supra*, the case most relied on, was correctly decided, and rests upon two principles: the general rule of reversion and estoppel. The question of a sole ownership at the time of the vacation was not involved. So, too, in the case of *Rowe v. James*. The street vacated abutted on lots owned by different parties. The lots had long since passed out of the common grantor. The vacated street reverted under § 7842 of the code. In *Burmeister v. Howard*, the vacation was granted upon the petition of abutting lot owners, and the general rule of reversion was recognized, subject, however, to an estoppel. There is nothing in the case of *Milton v. Crawford* that pertains in any way to the present issue.

Nor do we understand the payment of the taxes by the plaintiffs and their predecessors in interest on one-half of the vacated street will defeat the true title. Payment of taxes is proper evidence in support of a claim of title. 1 Ency. of Law 680. It is not conclusive unless made so by the statute. Our statute, § 786 (P. C. 81 § 1373), provides that payment of taxes for seven years under color of title will support a claim of title. There is no color of title in plaintiffs to the land in controversy, and in the light of the record and

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the law, as we have found it to be, no right has ripened in the plaintiffs by reason thereof.

This conclusion makes it unnecessary to inquire whether plaintiffs are estopped by their conduct to claim title to vacated "E" street.

Reversed and remanded with instructions to dismiss.

MOUNT, PARKER, and GOSE, JJ., concur.

ON PETITION FOR REHEARING.

[Decided September 13, 1913.]

PER CURIAM.—A petition for rehearing has been filed in which respondents complain that this court has overlooked, and by its omission has overruled, the many decisions of this court holding that, where no exceptions are taken to the findings of fact, the court will not review the case except to inquire whether the findings sustain the decree or judgment. Counsel say:

"We cited repeated rulings of this court to the effect that the failure to take exceptions to the findings of fact is ground for striking the statement of facts and for preventing the court from considering such a statement except as to those portions which have to do solely with the ruling of the court in regard to evidence. If this rule of law has not been overruled then this case at bar would have to be affirmed. If this court, on the other hand, intends to overrule all of these cases which we cited, then it seems to respondents that the opinion should so state."

In the interest of brevity, we have frequently omitted a discussion of objections that do not touch the merits of a case. We had not supposed that the objection was seriously urged until the petition for rehearing came in. No findings of fact were made by the court. A general exception was taken to the decree, and it was allowed by the court. Counsel assume that appellant should have treated the decree as findings of fact, and entered specific exceptions to the several matters covered by it. The statute puts no such burden upon an ap-

pellant, nor has this court ever held that such exceptions to a decree are required. The statute provides:

“It shall not be necessary or proper to take or enter an exception to any ruling or decision mentioned in the last section which is embodied in a written judgment, order or journal entry in the cause. But this section shall not apply to the report of a referee or commissioner, or to findings of fact or conclusions of law in a report or decision of a referee or commissioner, or in a decision of a court or judge upon a cause or part of a cause, either legal or equitable, tried without a jury.” Rem. & Bal. Code, § 382 (P. C. 81 § 671).

We have held that, if findings are made in equity cases, exceptions must be taken as in actions at law; such exceptions are required only in cases “where findings are made.” *McAllister v. McAllister*, 28 Wash. 613, 69 Pac. 119; *Berens v. Cox*, 70 Wash. 627, 127 Pac. 189; *McIntyre v. Johnson*, 63 Wash. 323, 115 Pac. 509; *Yakima Grocery Co. v. Benoit*, 56 Wash. 208, 105 Pac. 476; *Murray v. Shoudy*, 18 Wash. 33, 42 Pac. 631. In the *McAllister* case, the court said:

“The respondent next insists that no exceptions were taken to the findings of fact made by the lower court, and that the cause cannot be reviewed in this court for that reason. There were no formal findings of fact or conclusions of law made by the trial court. The records show that at the conclusion of the evidence and the arguments of counsel the court ordered the case dismissed, ‘as a case for divorce on the grounds of cruelty had not been made out.’ To this the appellant duly excepted. Afterwards a judgment of dismissal was entered, in which it is recited that the court ‘finds that the plaintiff has not sustained the allegations of her complaint,’ which was also duly excepted to by the appellant. The respondent does not point out what further exception he conceives ought to have been taken, nor does he say why he deems the exceptions taken insufficient. In our opinion, the exceptions are sufficient. They clearly pointed out to the trial court the appellant’s claim of errors in its rulings and decisions, and this is all that is required by the statute. Bal. Code, §§ 5050, 6520.”

It is also complained that we have not held that appellant is not entitled to a part of lot 3, now occupied by it, and

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which is admittedly owned by respondents. Appellant has not claimed any part of respondents' property and the issues called for no ruling such as is now invited. Upon the record before us, the parties are entitled to claim within the calls of their deeds and not beyond them.

We are also asked to so modify our opinion as to permit a recovery of taxes which have been paid in good faith and inured to the benefit of appellant. If this item cannot be amicably adjusted, as it should be, our decision will be without prejudice to an action to preserve respondents' legal rights, whatever they may be.

Rehearing denied.

[No. 11068. Department Two. July 28, 1913.]

CHARLES I. MUNDY, *Appellant*, v. F. A. KERN *et al.*,
Respondents.¹

JUSTICES OF THE PEACE—JUDGMENT—RENDITION—DELAY IN ENTRY—EFFECT. Under Rem. & Bal. Code, § 1770, requiring a justice of the peace to keep a docket and enter judgment when rendered, and Id., § 1859, providing that in trials by the justice judgment shall be entered immediately after the close of the trial, and Id., § 404, defining a judgment to be the final determination of the action, a justice's announcement of judgment for the plaintiff at the close of the trial is the rendition of judgment, and the entry being a ministerial act, delay of ten days in making the entry is not so unreasonable as to render the judgment void.

SAME—JUDGMENT—REVIEW—APPEAL—INJUNCTION. Where matters of defense in an action before a justice do not show want of jurisdiction over the subject-matter, the remedy of a party aggrieved by the judgment is by appeal or review, and not injunction against enforcement of the judgment.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered March 16, 1912, dismissing an

¹Reported in 133 Pac. 1035.

action for equitable relief, upon sustaining a demurrer to the complaint. Affirmed.

Pruyn & Hoeffler, for appellant.

F. A. Kern, for respondents.

MAIN, J.—The purpose of this action is to obtain an injunction restraining the levying of an execution, and to have declared void a judgment upon which the execution issued.

On February 26, 1912, the appellant filed in the superior court his amended complaint, the material parts of which are, in substance, as follows: That in the month of December, 1911, the respondent F. A. Kern commenced an action before a justice of the peace in Ellensburg precinct, Kittitas county, Washington; that appellant appeared therein and filed his answer on December 19, 1911; that the cause was tried on the same day, and at the conclusion of the trial the justice announced "judgment for plaintiff"; that at the time of the trial the justice had not entered the cause upon his docket, nor any of the proceedings therein, nor had he done so on December 29, 1911; that he did not enter on his docket a judgment in favor of the plaintiff and against the defendant until more than three days had elapsed after the date of the trial; that the judgment so entered is void; that execution has been issued and is now in the hands of the respondent B. A. German, as sheriff of Kittitas county, who is about to levy upon the property of appellant and sell the same to satisfy the judgment; that appellant will be thereby irreparably injured, and has no plain, speedy or adequate remedy at law. The appellant further alleges facts which constituted his defense to the action before the justice.

To this complaint, on March 1, 1912, the respondents filed a general demurrer. Thereafter, and on March 16, 1912, the demurrer was considered by the court and an order entered sustaining the same. The appellant failed to plead further within the time allowed, and on March 16, 1912, a

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judgment was entered dismissing the appellant's action and rendering judgment against him for costs. This appeal follows.

Section 1770, Rem. & Bal. Code (P. C. 287 § 127), provides that "every justice of the peace shall keep a docket in a well bound book, in which he shall enter,— . . . The judgment of the court, and the time when rendered." The section contains thirteen other subdivisions providing other entries which the justice of the peace shall make under proper circumstances prior and subsequent to judgment. Section 1859, Rem. & Bal. Code (P. C. 287 § 235), provides:

"Upon the verdict of a jury, the justice shall immediately render judgment thereon. When the trial is by the justice, judgment shall be entered immediately after the close of the trial, if the defendant has been arrested and is still in custody; in other cases it shall be entered within three days after the close of the trial."

The foregoing provisions of the statute direct the justice to keep a docket, provide the entries he shall make therein, and the times when judgments shall be entered therein. No time is fixed for the making of the entries other than judgments. When the justice announces or renders judgment, he performs a judicial act; the entry of the judgment in his docket is the performance of a ministerial act. His failure to make the entries in his docket at the time prescribed by the statute does not render the judgment void. This ministerial act may be lawfully performed thereafter. In *Fish v. Emerson*, 44 N. Y. 376, it was said:

"The act of rendering judgment by the justice is judicial; that of entering it in his docket is ministerial. The judicial functions of the justice are completed when he has rendered his judgment. The duty of rendering judgment where the cause is tried by himself is imperatively to be performed within four days. The duty of entering it in his docket has been held to be directory merely, owing to its ministerial character, and although the time is prescribed by the statute to be four days, within which it is to be done, that is not a limita-

tion upon the power of the justice, but it may be validly performed afterward."

The appellant cites and apparently chiefly relies upon the case of *Tomlinson v. Litze*, 82 Iowa 32, 47 N. W. 1015, 31 Am. St. 458. In that case, under a statute requiring the justice to enter a judgment forthwith, it was held that a judgment not entered for more than ninety days after the verdict of the jury had not been entered within a reasonable time, and was therefore void. But the rule there announced is hardly applicable to the present case, for the reason that there more than ninety days had elapsed after the conclusion of the trial; while in the present case, according to the allegations of the complaint, the judgment had not been entered within ten days after the time required by the statute. To make the rule of the Iowa case applicable, it would be necessary to hold that a delay of ten days in entering the judgment was such an unreasonable delay as to avoid the judgment. This, we think, should not be done.

Section 404, Rem. & Bal. Code (P. C. 81 § 748), defines a judgment to be "the final determination of the rights of the parties in the action." At the close of the trial, the justice announced "judgment for plaintiff." It is clear that the justice intended by the words uttered to render judgment in favor of the plaintiff and against the defendant for the full amount of plaintiff's claim. The appellant was evidently present, and does not allege that he was misled thereby. The announcement of the justice indicated that he had determined the issues in favor of the plaintiff and against the defendant; that he had determined the rights of the parties and considered that the plaintiff was entitled to judgment in the sum claimed. This announcement, and not the entry in his docket, constituted the judgment. The entry in the docket, when made, would constitute the best evidence of the judgment. *Hickey v. Hinsdale*, 8 Mich. 267, 77 Am. Dec. 450; *Packet Co. v. Bellville*, 55 W. Va. 560, 47 S. E. 301. In the last case cited it is said: "The announcement of the con-

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clusion arrived at by the justice is the judgment. The entry of it upon his docket is simply the evidence of the judgment."

The appellant attempted in his complaint to challenge the jurisdiction of the justice over the subject-matter of the action upon which the judgment was rendered. We do not, however, consider that the facts stated in the amended complaint are sufficient to show a want of jurisdiction by the justice over the subject-matter of the action. It appears to us that the facts alleged were mere matters of defense. If the appellant felt aggrieved by the judgment of the justice in this regard, his remedy was by appeal or review.

The facts stated in the amended complaint were not sufficient to constitute a cause of action against the respondents, and the superior court properly sustained their demurrer. The judgment is therefore affirmed.

ELLIS, FULLERTON, and MORRIS, JJ., concur.

[No. 11129. Department One. July 28, 1913.]

EXCHANGE NATIONAL BANK OF SPOKANE, *Appellant*, v.
ALEX. PANTAGES, *Respondent*.¹

GUARANTY—TELEGRAM—CONSTRUCTION. Where a corporation, upon demand for payment or security of its note given to a bank for a loan, sought a renewal agreeing that its president should guarantee the note, and the president, knowing that the bank was not satisfied, telegraphed "Tell bank I request them to renew note . . . I will arrange things satisfactory to them upon my return," which caused the bank to forebear, the telegram was understood as, and was, a guaranty of the note; since no particular form of words is necessary and the writing must be so construed as to determine the intention of the parties.

Appeal from a judgment of the superior court for King county, Tallman, J., entered November 23, 1912, dismissing

¹Reported in 133 Pac. 1025.

an action on contract, upon sustaining a demurrer to the complaint. Reversed.

Nuzum, Clark & Nuzum and Sullivan & Christian, for appellant.

John E. Ryan and Grover E. Desmond, for respondent.

MOUNT, J.—The lower court sustained a general demurrer to the plaintiff's complaint in this case and dismissed the action. The plaintiff has appealed.

The complaint alleges, in substance, that the plaintiff is a national bank, doing business in the city of Spokane; that the Pantages Amusement Company is a corporation conducting a theater and amusement business in Spokane; the Pantages Theater Company is likewise a corporation doing a theater business; that the Pantages Amusement Company is one of a chain of theaters controlled by the defendant, beginning at Spokane and ending at Los Angeles, California, theaters in Seattle and Tacoma being a part of the chain; that the Pantages Theater Company is also owned and controlled by the defendant; that at all times the defendant was a stockholder in and president of the Pantages Amusement Company; that, on June 15, 1911, the amusement company executed to plaintiff its promissory note for \$2,500, due ninety days after date, with interest thereon at the rate of eight per cent per annum; that the note was renewed when due for a period of ninety days; that on December 12, 1911, when the renewal note became due, plaintiff demanded that the amusement company pay the same or secure the guaranty or endorsement thereof by the defendant; that the amusement company agreed to secure the guaranty of the note by the defendant, and at that time the amusement company executed to plaintiff a new note for the same amount, payable ninety days after December 12, 1911; that said note was not delivered or accepted as an obligation of the amusement company nor in satisfaction of the previous note, but that

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plaintiff took and held the same in accordance with the understanding with the amusement company until the amusement company should secure the guaranty of the note by the defendant; that, on the 14th day of January, 1912, the defendant, for a good and valuable consideration, telegraphed Clark Walker, who is the general manager of the amusement company, under the defendant's signature, a telegram, of which the following is a copy, to wit:

"San Francisco, Calif., Jan. 14, 1912.

"Clark Walker, Pantages Theater, Spokane.

"Tell bank I request them to renew the note. Security just as good now as when loan was first made and they are collecting interest on their money. I will arrange things satisfactory to them upon my return to Seattle. Alex. Pantages"; that, on account of said telegram and the assurances therein contained, the plaintiff accepted the new note and did not enforce the payment on the original indebtedness which, prior to that time, the bank had threatened to do, relying upon the assurances of the defendant that he would arrange things satisfactorily to the plaintiff, and but for these assurances the plaintiff would have proceeded with its remedy on the original indebtedness; that, at or about the time of the execution of the original note, the defendant assured the officers of the plaintiff that the amusement company had ample resources to meet the payment of the note, and defendant was instrumental in securing the loan of the money represented by the note and the renewal thereof; that it was to the interest of the defendant that the plaintiff desist from bringing suit upon the note or upon the original indebtedness for the reason that, if the plaintiff had commenced suit against the amusement company, it could and would have closed the theater in Spokane in which the companies were showing and in other theaters owned and managed by the defendant, broken up the circuit, and made it impossible for the defendant to have shown his attractions in Spokane; that, on or about the 26th day of March, 1912, an action was commenced by Lois

Pantages, the wife of the defendant, against the amusement company, in King county, on sixteen promissory notes signed by the amusement company, in most cases payable to the Pantages Theater Company owned and controlled by the defendant, said notes aggregating \$10,000; that a receiver was appointed and all the property of the amusement company sold to the theater company for a nominal consideration; that there is no money or property of the amusement company out of which to satisfy the plaintiff's demands; that it was not true, as stated in the guaranty and telegram of the defendant, that the security held by the plaintiff was as good at the time as when the loan was first made; but that the assets of the amusement company were being decreased by the defendant wholly and solely for the purpose of absorbing all of the assets of the amusement company; that plaintiff, on account of the matters contained in the telegram, did not bring suit upon the original indebtedness, but accepted the new note executed December 12, 1911, lost what security it had by reason of the then existing assets of the amusement company, and was prevented from realizing anything from the amusement company on account thereof; that no provision was made by the defendant for the payment of the note, no arrangement of any kind was made to secure the same by the defendant, and the note was never paid. The second cause of action was for a separate note for \$2,500, based upon substantially the same state of facts.

The controlling question presented here is whether the telegram hereinbefore quoted constituted a guaranty by the defendant, Alex. Pantages, of the note sued upon. The trial court was evidently of the opinion that this telegram did not constitute a guaranty of the note, and therefore held that the complaint did not state a cause of action upon either note.

It is conceded in the brief that no particular form of words is necessary to constitute a guaranty. The rule seems to be that in order to constitute a guaranty the writ-

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ing should be so construed as to determine the intention of the parties or, as stated in *Bell v. Bruen*, 1 How. 169:

“We think the court should adopt the construction which, under all the circumstances of the case, ascribes the most reasonable, probable, and natural conduct to the parties. In the language of this court in *Douglas v. Reynolds*, 7 Peters 122, ‘Every instrument of this sort ought to receive a fair and reasonable interpretation according to the true import of its terms. It being an engagement for the debt of another, there is certainly no reason for giving it an expanded signification, or liberal construction beyond the fair import of the terms.’ Or, it is ‘to be construed according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical nicety’; as declared in *Dick v. Lee*, 10 Peters 493, The presumption is of course to be ascertained from the facts and circumstances accompanying the entire transaction.”

According to the facts alleged in the complaint, the defendant knew that the bank was not satisfied with the note which was offered as an extension of the payment of the note which was then past due. He then telegraphed to Mr. Walker, who was attempting to arrange for the extension: “Tell bank I request them to renew the note. . . . I will arrange things satisfactory to them upon my return to Seattle.” We think it was clearly the intention of the defendant to guarantee the payment of the note, and it was evidently so understood by the bank at that time, according to the allegations of the complaint. In *Goldring v. Thompson*, 58 Fla. 248, 51 South. 46, 25 L. R. A. (N. S.) 418, the language used was: “Your money is good. I will be in your city in a few days.” It was held that this constituted a guaranty. In *Dover Stamping Co. v. Noyes*, 151 Mass. 342, 24 N. E. 53, it was said that the plaintiff should be “taken care of.” It was held that this constituted a guaranty. In *Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279, where the statement was made, “Give John a little more time and I will see that you get your money,” was held to be a guaranty. In *Mott Iron Works v. Clark*, 87 S. C. 199, 69 S. E. 227, the statement, “I will see

that you are protected in any dealings you may have with this corporation," was held to be a guaranty. In *Birdsall v. Heacock*, 82 Ohio St. 177, 80 Am. Rep. 572, the statement, "Please send my son the lumber he asks for and it will be all right," was held to be a guaranty. We think the language quoted above in this case used by Mr. Pantages in his telegram, under the circumstances surrounding the transaction, was understood to be, and was, a guaranty of the note. We are of the opinion, therefore, that the court was in error in sustaining the general demurrer to the complaint. The judgment is reversed and the cause remanded for further proceedings.

GOSE, CHADWICK, and PARKER, JJ., concur.

[No. 11258. Department Two. July 29, 1913.]

C. A. BIRCH *et al.*, Respondents, v. W. R. ABERCROMBIE *et al.*,
Appellants.¹

MUNICIPAL CORPORATIONS—USE OF STREETS—AUTOMOBILES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The negligence of the driver of an automobile in running down a pedestrian, and the contributory negligence of the plaintiff, is for the jury, where the plaintiff looked before starting across the street and the street was clear of traffic for one block and no car in sight, and the evidence was conflicting as to whether the driver sounded a warning until just before striking the plaintiff.

MASTER AND SERVANT—LIABILITY TO THIRD PERSONS—OWNERSHIP OF AUTOMOBILE—PRESUMPTIONS. The ownership of an automobile is *prima facie* proof that it was in the possession of, and was being driven for, the owner.

SAME. Where an automobile, purchased by defendant for the use of his family, was driven by his daughter for her own pleasure, the presumption that it was in his possession and used in his business is not overcome by evidence of mere advice and the expression of a preference on his part that she should not drive it; especially where, answering written interrogatories, he stated that she was permitted to, and had, run it on different occasions.

¹Reported in 133 Pac. 1020.

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SAME—INJURY TO THIRD PERSONS—CHILD AS AGENT OF PARENT—DRIVING AUTOMOBILE—SCOPE OF EMPLOYMENT. The owner of an automobile purchased for the use of his family, is liable to third persons for injuries sustained through the negligent driving of his daughter using the car for her own pleasure by his consent, express or implied; not by reason of the relation of parent and child, but through the relation of agency or service; since she was using it for the purposes for which it was kept, and in every just sense, in his business as his agent; and it is immaterial that no other member of the family was present.

TRIAL—RECEPTION OF EVIDENCE—MISCONDUCT OF COUNSEL—FACT OF LIABILITY INSURANCE. In an action for personal injuries, it is reversible error for plaintiff's counsel to unnecessarily inject into the record evidence of a conversation in which the defendant admitted that he carried liability insurance and hence could not settle for the injury, and the error is not cured by striking out the evidence; especially where a second conversation was detailed with the apparent purpose of keeping the matter before the jury, which the court refused to strike out.

APPEAL—REVIEW—MOTION FOR NEW TRIAL—NECESSITY. Error in refusing to discharge the jury because of improper conduct of counsel, will be reviewed on appeal from the judgment without any formal motion for a new trial.

Appeal from a judgment of the superior court for Spokane county, Sessions, J., entered March 14, 1913, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries. Reversed.

Cannon, Ferris & Swan and Walter A. White, for appellants.

Smith & Mack, for respondents.

ELLIS, J.—This is an action to recover damages for injuries sustained by the plaintiff, Julia M. Birch, by being struck by an automobile owned by the defendants W. R. Abercrombie and wife, which was at the time being driven by their daughter, the defendant Frances Abercrombie. The trial resulted in a verdict and judgment in favor of the plaintiffs, and against all of the defendants, for \$2,000 and costs. The evidence, so far as necessary, will be noticed in the discussion. At appropriate times, the defendant Frances Aber-

crombie moved for a directed verdict, for a new trial and for judgment notwithstanding the verdict. The defendants W. R. Abercrombie and wife moved for directed verdict and for judgment notwithstanding the verdict. All of these motions were overruled, and each of the defendants appealed.

I. It is first contended, on behalf of all of the appellants, that the evidence was insufficient to establish any negligence on the part of Frances Abercrombie, and that in any event the respondent Julia M. Birch was guilty of contributory negligence as a matter of law. We shall not attempt an exhaustive review of the evidence. The following will suffice: It is admitted that the appellant Frances Abercrombie was driving the automobile north on Jefferson street in the city of Spokane, and that, near the intersection of that street with First avenue, the machine struck the respondent Julia M. Birch, who was crossing Jefferson street diagonally from west to east; that Jefferson street is sixty feet wide, and that Mrs. Birch was struck at a point about twelve feet from the east curb of the street. It seems to be admitted, also, that Mrs. Birch's hearing was slightly impaired prior to the accident. She testified that, before leaving the curb on the west side of the street, she looked south on Jefferson street and saw nothing, the street being perfectly clear for a distance of about a block; that she had no intimation of the approach of the automobile until the ringing of the bell the instant before she was struck. Another witness testified, in substance, that he heard the bell ring violently just at the time the woman was struck, but heard no other warning, and stated that, if the bell had been sounded before that time, he thought he would have remembered it, as he was coming down the street in the same direction as the automobile. Evidence was introduced on behalf of the appellants to the effect that the automobile was running slowly at the time of the accident, and that the bell was sounded several times before Mrs. Birch was struck. Upon this conflict of evidence, the questions of Miss Abercrombie's negligence in failing to sound the bell, and of

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Mrs. Birch's contributory negligence in failing to look south after leaving the west curb, were clearly for the jury. We have so held repeatedly on facts essentially parallel. *Ludwigs v. Dumas*, 72 Wash. 68, 129 Pac. 903; *Hillebrant v. Manz*, 71 Wash. 250, 128 Pac. 892; *Lewis v. Seattle Taxicab Co.*, 72 Wash. 320, 130 Pac. 341.

II. It is contended on behalf of appellants W. R. Abercrombie and wife that, even conceding that a case was made as against the daughter, the evidence exonerates them from liability in that the automobile was at the time in use by the daughter for a purpose of her own, and not as their servant or agent. The jury in addition to the general verdict, found in answer to special interrogatories: (1) That Frances Abercrombie was at the time of the accident driving the machine for her own pleasure; (2) that she was not driving the machine without the knowledge or consent of her parents express or implied; (3) that her parents had not prior to the accident ordered or directed her not to drive the machine. The appellants contend that the last two findings are without support in the evidence. This contention ignores the admitted ownership of the automobile by the appellants W. R. Abercrombie and wife. It is well established that, in cases of this kind, where the vehicle doing the damage belonged to the defendants at the time of the injury, that fact establishes *prima facie* that the vehicle was then in the possession of the owner, and that whoever was driving it was doing so for the owner. We have repeatedly so held. *Knust v. Bullock*, 59 Wash. 141, 109 Pac. 329; *Kneff v. Sanford*, 63 Wash. 503, 115 Pac. 1040; *Burger v. Taxicab Motor Co.*, 66 Wash. 676, 120 Pac. 519. The burden was thus cast upon the appellants to overcome this presumption by competent evidence and it was for the jury to say upon such evidence whether the burden had been sustained. There was evidence that the automobile was purchased by the appellant W. R. Abercrombie for the use of his family. He testified that it was sent, in the morning of each day, from the garage where it was kept, to

his home for that purpose and taken away in the evening. On June 5, 1912, both W. R. Abercrombie and his wife were away from home, and the daughter, the appellant Frances Abercrombie, entertained a number of friends at luncheon. She was taking them home in the automobile when the accident happened. Both W. R. Abercrombie and his wife testified that the daughter was not strong, and that running the machine was a tax on her nerves, and that, for that reason, sometime before the accident, they had advised her not to run the machine, and told her that they would rather she would not run it. Mr. Abercrombie testified that this was "emphatic and positive, in the shape of an order from parent to child." This last statement was obviously a conclusion, and hardly sustained by the words actually used as testified to by him. In rebuttal, the respondents introduced certain interrogatories propounded by them to the appellant W. R. Abercrombie, and his answers thereto. Two of his answers read as follows:

"Answering interrogatory Number 3, these defendants state that Frances Abercrombie was permitted to use the electric vehicle owned by them at different times."

"Answering interrogatory Number 4, these defendants state that Frances Abercrombie had used the electric vehicle owned by them on some occasions prior to June 5, 1912."

In view of these answers to the written interrogatories, and in view of the fact that the automobile was being used for the very purpose for which it was purchased and kept, and in view of the presumption attending admitted ownership, we cannot say that the last two findings of the jury are not supported by competent evidence. The presumption attending ownership was not overcome, as a matter of law, by evidence of mere advice and an expression of preference on the part of the parents some weeks before that the daughter should not drive the machine, especially in view of the fact that antecedent knowledge and consent of the parents to her use of the machine were admitted by the answers to the interrogatories.

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There being competent evidence from which the jury might reasonably find as it did, we must assume that Frances Abercrombie had been permitted the use of the machine and that she was at the time of the accident using it with the consent of her parents.

This reduces the consideration of the appellants' contention under this head to answering a single question: If Frances Abercrombie was driving the automobile for her own pleasure, were the father and mother, notwithstanding that fact, liable for the injury to the respondent resulting from her negligence under the other evidence adduced?

It is conceded that an automobile is not an agency so dangerous as to render the owner liable for injuries to travelers on the highway inflicted thereby while being driven by another, irrespective of the relation of master and servant or agency as between the driver and the owner, and we have so held. *Jones v. Hoge*, 47 Wash. 663, 92 Pac. 433, 125 Am. St. 915, 14 L. R. A. (N. S.) 216. This concession eliminates any necessity to review the following authorities, cited by the appellant, in which the driver was either not in any sense the agent or servant of the owner, or though a servant, was acting for himself and obviously outside of the scope of his employment and not in connection with the owner's business. These authorities are cited only to the point conceded. *Jones v. Hoge, supra*; *Robinson v. McNeill*, 18 Wash. 163, 51 Pac. 355; *Slater v. Advance Thresher Co.*, 97 Minn. 305, 107 N. W. 133; *Lotz v. Hanlon*, 217 Pa. 339, 66 Atl. 525, 118 Am. St. 922, 10 L. R. A. (N. S.) 202; Huddy, *Automobiles*, p. 95.

It must also be conceded that a parent is not liable for the torts of his child solely on the ground of relationship. The liability, if any exists, must rest in the relation of agency or service. This eliminates any necessity for a review of the following authorities, cited by the appellant, only in support of that point. *Mirick v. Suchy*, 74 Kan. 715, 87 Pac. 1141; *Chastain v. Johns*, 120 Ga. 977, 48 S. E. 343, 66 L. R. A. 958; *Kumba v. Gilham*, 103 Wis. 312, 79 N. W. 325.

This leaves only two cases cited by the appellant under this head for our consideration. They are *Reynolds v. Buck*, 127 Iowa 601, 103 N. W. 946, and *Doran v. Thomsen*, 76 N. J. L. 754, 71 Atl. 296, 131 Am. St. 677, 19 L. R. A. (N. S.) 335. The case of *Reynolds v. Buck* is clearly distinguishable from the case in hand on the facts. In that case the defendant, a dealer in automobiles, decorated one for use in a parade, and after the parade directed that the machine which stood in front of the store be taken inside, and he then left. His son, who was employed as a clerk and who had been given a holiday, coming upon the machine where it stood, invited a lady friend to ride. While he was driving, the plaintiff's horse took fright at the machine and the plaintiff was injured. It was held that the defendant was not liable, on the ground that the son was using the automobile for his own purpose without the knowledge or consent of the father and in a matter wholly disconnected with the father's business. In the case before us the automobile was purchased and kept for the use of the family. It was customary for the members of the family to drive it at their pleasure. It was intended for no other purpose. At the time of the accident, it was being so used, as the jury found on what we must hold competent evidence, with the knowledge and consent of the appellants W. R. Abercrombie and wife. The distinction from the *Buck* case is plain.

The case of *Maher v. Benedict*, 123 App. Div. 579, 108 N. Y. Supp. 228, cited in *McNeal v. McKain*, *infra*, seems to have been decided on the same ground though the facts would hardly seem to justify it. The general rule of liability, however, as there stated, distinctly sustains a liability in the case here. The court said:

"Liability arises from the relationship of master and servant, and it must be determined by the inquiry whether the driving at the time was within the authority of the master, in the execution of his orders, or in the doing of his work."

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The New Jersey case, *Doran v. Thomsen*, is not distinguishable on the facts from the case before us. The father owned the automobile, kept it on his premises, and the daughter used it with his knowledge and consent at her pleasure. While heartily subscribing to the view there expressed, "that the mere fact of the relationship of parent and child would not make the child the servant of the defendant," we think the opinion unsound in that it ignores the agency induced by the fact, independent of that relationship, that the daughter was using the machine for the very purpose for which the father owned it, kept it, and intended that it should be used. It was being used in furtherance of the very purpose of his ownership and by one of the persons by whom he intended that purpose should be carried out. It was in every just sense being used in his business by his agent. There is no possible distinction, either in sound reason, sound morals, or sound law, between her legal relation to the parent and that of a chauffeur employed by him for the same purpose. The fact that the agency was not a business agency, nor the service a remunerative service, has no bearing upon the question of liability. *McNeal v. McKain*, 33 Okl. 449, 126 Pac. 742. In running his vehicle, she was carrying out the general purpose for which he owned it and kept it. No other element is essential to invoke the rule *respondeat superior*. We think that the instruction which is criticized in the *Doran* case is, in itself, a complete answer to the opinion. It declared the use of the machine for the purpose for which it was owned, by the person authorized by the owner to so use it, a use in the owner's business. It seems too plain for cavil that a father, who furnishes a vehicle for the customary conveyance of the members of his family, makes their conveyance by that vehicle his affair, that is, his business, and any one driving the vehicle for that purpose with his consent, express or implied, whether a member of his family or another, is his agent. The fact that only one member of the family was in the vehicle at the time is in no sound sense a differentiating circumstance ab-

rogating the agency. It was within the general purpose of the ownership that any member of the family should use it, and the agency is present in the use of it by one as well as by all. In this there is no similitude to a lending of a machine to another for such other's use and purpose unconnected with the general purpose for which the machine was owned and kept.

An examination of the authorities cited, and an independent search, induces the belief that the *Doran* case stands practically alone. Some courts have sought on slight circumstances to distinguish it. One has frankly criticized it. We have found none which followed it. In *Stowe v. Morris*, 147 Ky. 386, 144 S. W. 52, 39 L. R. A. (N. S.) 224, the supreme court of Kentucky, holding a father liable on closely analogous facts, used the following language:

"In the first place, it may be said that a considerable part of the discussion of counsel is addressed to the idea that, even though the son was generally the agent or servant of the father in the operation of the car, the father is not liable under the facts stated here, because the son was engaged at the time in an enterprise of his own,—the seeking and giving of pleasure to himself, his sister, and their friends, upon an excursion of his own,—in which the father had no interest, and which was not in the line or scope of the son's employment. The question ordinarily is a vital one in cases of this character; but it is of no consequence here. For the only ground upon which the father can be held answerable for this act of his son excludes the idea of an independent venture, under the facts detailed. That ground is, as contended for by the appellee, that the machine was bought and operated for the pleasure of the family; that, at the time of the accident, the son was engaged in carrying out the general purpose for which the machine was bought and kept; and that, as he took it out at the time in pursuance of general authority from his father to take it when he pleased, for the pleasure of the family and himself as a member of it,—the purpose for which it had been bought,—he was engaged in the execution of his father's business, i. e., the supplying of recreation to the members of the father's family. . . . So, in the case at

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bar, the father had provided his family with this car as a means of recreation and amusement; and the son, in the use of the car for that purpose, was not performing an independent service of his own, but was carrying out what within the spirit of the matter, was the business of the father."

Referring to the *Doran* case, the court says:

"It is true that there is authority of a most excellent character in direct conflict with the views which we have set out. Notable among the cases are those of *Doran v. Thomsen*, 76 N. J. L. 754, 71 Atl. 296, 19 L. R. A. (N. S.) 335, 131 Am. St. Rep. 677, and *Maher v. Benedict*, 123 App. Div. 579, 108 N. Y. Supp. 228; but the conclusion reached by us is sustained both by the case of *Lashbrook v. Patten*, from this court, and by what we believe to be the sounder argument."

In *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351, another case analogous to that in hand, except in its reference to the minority of the offending child, which fact we deem immaterial, the court said:

"The evidence discloses that the machine was devoted to the use of the family of which Ernest was a member. It was a pleasure vehicle and when used for the pleasure of one of the minor children of the owner, how can it be said that it was not being used on business of the owner?"

In *Marshall v. Taylor*, 168 Mo. App. 240, 153 S. W. 527, the same court, referring to the *Maxwell* case, said:

"But further we held that the use of the car by the minor son for his own pleasure and with the consent of his father, the owner, was one of the uses for which the vehicle was kept and, therefore, was a part of the service for which the owner had authorized the boy to run the car as his servant. The only difference between that case and this is that here the young man had attained his majority, was *sui juris*, and his father owed him no duty of parentage, and, of course, was under no obligation to provide him with means of pleasure and recreation. We do not think this fact is determinative of the question of defendant's liability. The real question at issue is not that of the legal duty defendant owed his son, but is whether or not the son was the agent of his father in running the car. Frequently fathers continue not only to sup-

port their children after the latter have become *sui juris*, but to provide them, as members of the family, with the means of recreation and pleasure. This car was provided by defendant for the use of his immediate family. He contemplated and intended that his son should enjoy it in common with other members of the family. When in such use it was as much in his service as it would have been had it been occupied by his wife, his daughter, his mother, or his guest. We conclude that the young man was not a mere servant using his master's vehicle for his own purpose but was the agent of his father operating the car for one of the purposes of its intended use."

In *McNeal v. McKain*, 33 Okl. 449, 126 Pac. 742, another case of the same character, the court said:

"Vehicles and motor cars may be used, not only for the business of the master for profit, but also in his business for pleasure. If Paul, the minor son of the plaintiff in error, had been driving his father's carriage (whilst he was a member of his family) in which were contained his sister and a guest of his father's house, the same being done by him with the express or implied consent of his father, the relation of master and servant would exist, and the father would be liable for the negligent acts of the minor son whilst engaged in the driving of the carriage, and the same rule is supported by authority as to motor cars."

See, also, *Bourne v. Whitman*, 209 Mass. 155, 95 N. E. 404, 35 L. R. A. (N. S.) 701; *Moon v. Matthews*, 227 Pa. 488, 76 Atl. 219, 136 Am. St. 902, 29 L. R. A. (N. S.), 856.

We think that, both on reason and authority, the daughter in the present instance should be held the agent of her parents in the use of the automobile. Any other view would set a premium upon the failure of the owner to employ a competent chauffeur to drive an automobile kept for the use of the members of his family, even if he knew that they were grossly incompetent to operate it for themselves. The adoption of a doctrine so callously technical would be little short of calamitous.

III. The appellants insist that the judgment must be reversed for the reason that, upon the trial, the respondents

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unnecessarily injected into the record evidence of a conversation between the respondent C. A. Birch and the appellant W. R. Abercrombie, in which the latter admitted that the appellants carried liability insurance, and hence could not settle for the injury and referred Mr. Birch to appellants' counsel. While the trial court, upon motion of the appellants, struck this testimony and instructed the jury to disregard it, he refused the appellants' request to discharge the jury from further consideration of the case. We think that this was error. In the nature of the case, the striking of the evidence and the instruction to disregard it cannot cure the prejudicial effect of the fact being brought to the attention of the jury. As said by the late Judge Dunbar in *Iverson v. McDonnell*, 36 Wash. 73, 78 Pac. 202, quoting with approval from *Manigold v. Black River Traction Co.*, 81 App. Div. 381, 80 N. Y. Supp. 861:

“ ‘The law is well settled that it is improper to show, in an action of negligence, that the defendant is insured against loss in case of a recovery against it on account of its negligence. This was expressly held in the case of *Wildrick v. Moore*, 66 Hun. 630, 22 N. Y. Supp. 1119. It is not proper to inform the jury of such fact in any manner. It is not material to any issue involved in the trial of the action, and certainly plaintiff's counsel ought not to be permitted to do indirectly what he would not be permitted to do directly. The fact that the defendant in this action was insured was brought to the knowledge of the jury as conclusively by what occurred as if the question had been answered in the affirmative, and it is evident that the question was asked and the inquiry pressed, even after the ruling of the court that it was incompetent, for the very purpose of getting such fact before the jury. Immediately before the direct question was asked, the court had ruled that the inquiry as to who Dr. Rockwell represented was incompetent, and the objection to that question was sustained, and yet plaintiff's counsel then asked the direct question, which was, in effect, a statement that there was an insurance company back of the defendant. In order to protect the defendant, its counsel was forced to object to the question, and yet by doing so, he, in effect, admitted the

fact; otherwise no objection would have been made. It is true the learned trial court properly struck out the answer, and instructed the jury not to consider it; but plaintiff's counsel improperly got the fact before the jury—a fact which he knew he was not entitled to, and which the court had just excluded by its ruling. We think this constituted error which requires a reversal of the judgment.' ”

See, also, *Lowsit v. Seattle Lum. Co.*, 38 Wash. 290, 80 Pac. 431; *Stratton v. Nichols Lum. Co.*, 39 Wash. 323, 81 Pac. 831, 109 Am. St. 881. Moreover, even after this first evidence was stricken, the same witness was permitted to detail a second conversation in which the appellant W. R. Abercrombie again refused to settle and referred the witness to the appellants' counsel. Though in this connection no direct reference to the insurance was testified to, its only apparent purpose was to keep that matter before the jury. This last evidence the court refused to strike. This also was error. While counsel for appellants, in argument before this court, expressed a doubt that the appellants W. R. Abercrombie and wife, having filed no motion for a new trial, could insist upon this error, we think the statement was clearly inadvertent. The request to discharge the jury at the very time when the error was committed was in itself equivalent to a motion for a new trial. It gave evidence of absolute good faith in the objection, since the appellants, in making the demand at that time, negatived any disposition to speculate upon securing a favorable verdict notwithstanding the error while relying upon the error for a new trial on formal motion after verdict. Moreover, we have often held that, where the trial court has had an opportunity to rule upon an error claimed, it may be reviewed on appeal without a formal motion for a new trial. *Jones v. Jenkins*, 3 Wash. 17, 27 Pac. 1022; *Burns v. Commencement Bay Land & Imp. Co.*, 4 Wash. 558, 30 Pac. 668, 709; *Tingley v. Fairhaven Land Co.*, 9 Wash. 34, 36 Pac. 1098; *Carter v. Seattle*, 21 Wash. 585, 59 Pac. 500; *Sultan Water & Power Co. v. Weyerhauser Timber Co.*, 31 Wash. 558, 72 Pac. 114; *Dubcich v. Grand Lodge A. O. U. W.*, 33

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Wash. 651, 74 Pac. 832; *Crooker v. Pacific Lounge & Mattress Co.*, 34 Wash. 191, 75 Pac. 632; *Rowe v. Northport Smelting & Refining Co.*, 35 Wash. 101, 76 Pac. 529. While we are loath in any case to order a new trial where the verdict of a jury is sustained by competent evidence, we are equally loath to refuse a new trial where, through respondents' fault, incompetent and essentially prejudicial matter was unnecessarily placed before the jury.

The judgment is reversed, and the cause is remanded for a new trial.

MAIN and FULLERTON, JJ., concur.

MORRIS, J., concurs in the result.

[No. 10787. Department Two. July 29, 1913.]

P. C. RICHARDSON, *Respondent*, v. SARAH C. SEARS *et al.*,
Appellants.¹

CONTRACTS—PERFORMANCE OR BREACH—FORFEITURE—WAIVER. The right to forfeit a contract whereby plaintiff was to clear land by May 1st, 1905, receiving a specified portion of the land as pay for his services, is waived where the owners acquiesced in delay and encouraged the continuance of the work until November 1908, when the work was practically finished and the land had greatly increased in value, at all times allowing plaintiff and persons advancing money to him for the work to understand that the contract was still in force.

CONTRACTS—MEDIUM OF PAYMENT—CONSTRUCTION. A contract for the clearing of land providing that the contractor is to be compensated at the rate of \$125 per acre by having conveyed to him a portion of the land at the valuation of \$700 per acre, does not leave it optional with the owners to pay either in money or land; especially where further provisions gave the owners a lien on the contractor's portion of the land for rent falling due, and prevented him from erecting structures thereon which would be nuisances in the neighborhood.

CONTRACTS—CONSTRUCTION. A contract agreeing to convey specified portions of a tract of land in consideration of clearing the

¹Reported in 133 Pac. 1010.

tract does not entitle the contractor to "shore lands" in front of his portion of the tract.

SPECIFIC PERFORMANCE—DEFENSES—DELAY—EFFECT. Specific performance of a contract to convey land in consideration of services rendered will not be defeated by long delay in completing performance, during which time the land had greatly increased in value, where the contractor prosecuted the work in good faith and the owners acquiesced in the delay and urged completion of the work, and the owners were in no way prejudiced.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 6, 1912, upon findings in favor of the plaintiff, in an action for equitable relief. Modified.

Peters & Powell, for appellants.

Charles P. Spooner, for respondent.

MAIN, J.—This action was brought for the purpose of compelling a conveyance of real estate. On May 1, 1903, and for some time prior thereto, Joshua M. Sears and Sarah C. Sears, his wife, of Boston, Massachusetts, were and had been the owners in fee of a tract of land containing approximately 106 acres, in sections 23 and 26, Twp. 24 N., R. 4 E., W. M., lying about six miles south of the center of the city of Seattle, in King county, Washington, on the western shore of Lake Washington, near what is known as Brighton Beach. On June 5, 1905, Joshua M. Sears died. By the provisions of his last will and testament, the estate was to be managed by certain trustees, residing at or near the city of Boston, Mass. On March 16, 1906, the will was admitted to probate in the superior court of King county, this state, and W. A. Peters was appointed administrator with the will annexed for that portion of the estate which was then within the state of Washington.

By written contract, dated April 13, 1904, Sears and wife leased the lands above described to the plaintiff, for a term extending to the first day of May, 1909. The rent reserved was \$250 per annum from date until March 1, 1905, pay-

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able quarterly, and at the rate of \$925 per annum from the latter date until the end of the term, payable in like manner. The contract provided that the plaintiff was to immediately commence work upon certain described portions of said lands, amounting to about 90 acres, and in a specified manner clear and seed the same. The work was to be diligently prosecuted and completed on or before May 1, 1905. The contract was entire. It provided that the plaintiff "shall not be deemed to have earned any of his compensation until he has wholly or substantially completed the improvement as above contemplated." The provision of the contract with reference to the compensation that the plaintiff should receive for doing the work is as follows:

"As payment for which the party of the second part (Richardson) is to be compensated at the rate of \$125 per acre for the lands so improved being ninety (90) acres more or less, exclusive of the land to be conveyed to Richardson as herein provided; payment to be made when said work is fully completed to the satisfaction of the parties of the first part, by the conveyance to said second party, his heirs, executors, administrators or assigns of a portion of the above described tract of land at a valuation of \$700 per acre, said land to be taken from the following described tracts:"

Then follows a particular description of the tracts mentioned in the contract as tract "A" and tract "B," comprising about 16 acres, and as the contract states, "said tracts together to make up the acreage so to be earned by the said party of the second part." The contract contained other provisions ordinarily contained in leases which need not here be referred to.

Immediately after the execution of the contract, the plaintiff, being then in possession of the land, commenced the work of clearing. On May 1, 1905, that being the time specified in the contract, the work was not completed. The plaintiff, however, represented to the administrator that he could finish a portion of it by the fall of 1905 and the remainder in the spring of 1906. During the year 1905, representatives of

the trustees were in Seattle and went over the land and were informed by the administrator of the status of affairs. The administrator represented to them that the plaintiff was doing the best he could. Nothing was done towards interfering with the plaintiff in the progress of the work, and the matter drifted along until the spring of 1906. In March of that year it appears that, owing to the fact that the plaintiff had been disappointed in not receiving a substantial sum of money which he had expected, and owing to the further fact that the work was much more difficult to perform than had been anticipated, only about one-half of the clearing had been accomplished. No part of the rent due up to that time had been paid.

At this time, the plaintiff tendered to the administrator a check for the sum of \$1,335, being the amount of the rent then due, and requested that the trustees accept an assignment of the lease from the plaintiff to one Everett Smith, who was furnishing the plaintiff money to pay the rent and was undertaking to finance the proposition for the plaintiff to the completion; the plaintiff stating that the work would be fully completed by the fall of 1906. The administrator refused to accept the rent, stating that the plaintiff was in default and that he had no authority to make any waivers or changes in the contract. He stated, however, that he would submit the matter to the trustees, recommending that the plaintiff's request be complied with. The administrator forwarded the papers to the trustees with his recommendation that they be executed. On June 4, 1906, the extension agreement, properly executed, was mailed by the trustees from Boston to the administrator at Seattle. Before its receipt, the administrator had received an offer of purchase of the lands in question at the price of \$100,000, for the 106 acres. On June 6, 1906, the administrator by letter communicated this offer to the trustees. He also referred to the extension agreement advising that it would probably be well to execute it if the trustees decided not to sell the property until some

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later date. The fair market value of the property at the date of the execution of the contract was probably less than \$700 an acre, the amount at which plaintiff agreed to take it in payment for the work. In 1906 the values had doubled, and in 1909 a further material increase had taken place.

On October 27, 1906, the administrator again wrote the trustees concerning reinstating the plaintiff, and on November 22, 1906, the trustees wired and wrote the administrator inquiring whether he had received the extension agreement that they had mailed on June 4. It is evident from these communications and from the statements contained in the trustees' letter of October 13, that the trustees understood that the extension agreement had been delivered. On November 22, the administrator wired and wrote the trustees that the papers had been received and in his letter stated that they had never been delivered owing to the unexpected increase in the value of the property, and owing to the fact that he was awaiting the trustees' conclusion as to whether they were going to sell or hold the property. On November 30 the trustees acknowledged receipt of the administrator's letter of the 22d. This appears to be the last correspondence touching the delivery of the papers.

The extension agreement was never delivered. The work had not been completed in the fall of 1906 as had been anticipated. The plaintiff continued in possession, and in good faith and with all the means at his command prosecuted the work. The administrator at all times, from the commencement of the work until the same was nearly completed, urged the plaintiff to continue and to complete it as speedily as possible, believing, however, as he testified, that the contract had been forfeited, but that at the completion of the work the trustees would make a fair settlement and compensation for the work done. During the progress of the work, at different times, the plaintiff made proposals whereby he sought to secure a conveyance of a portion of the land he was to receive in order that he might encumber the same

for the purpose of raising money to meet his obligations and to prosecute the work. None of these proposals met with the approval of the administrator. During the progress of the work, the plaintiff incurred debts which he was unable to pay, and liens were filed and a judgment entered against the property thereon, amounting in all, including interest, to \$1,866.96, which the trustees were required to pay in order to avoid foreclosure. It appears that the plaintiff in doing the work incurred an indebtedness of something over \$18,000, not including his rent, of which sum over \$13,000 was borrowed money.

During the time the work was in progress, the administrator visited the place several times and looked over the work. He and the plaintiff went over the ground together in the month of September, 1908. The administrator then had with him the contract and referred to it in ascertaining whether the work was being done in accordance with its terms. The work was then practically all completed except the plowing and seeding. Reference was made to some work that had not been done on tract "B," but the plaintiff stated that he was not required to clear that tract, as it came to him, to which assent was made. After looking over the ground, the administrator designated certain work in addition to the plowing and seeding which should be done in order to complete it to his satisfaction. Thereafter this work was performed and the administrator was notified. On October 24, 1908, the plaintiff notified the administrator that the plowing and seeding were then being done.

On November 7, 1908, the administrator gave plaintiff written notice that any work he did was at his own risk. This was the first and only formal and written notice from the administrator or the trustees that they did not expect to be bound by the terms of the contract in settling for the work. It is evident from the communications passing from the plaintiff to the administrator that he at all times considered the contract in force, and that settlement would be

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made according to its terms by conveying to him tracts "A" and "B." On March 17, 1909, the plaintiff finished the work according to the terms of the contract. Settlement therefor not being made, in November, 1909, the present action was begun seeking to compel a conveyance of tracts "A" and "B" and the shore lands in front of tract "A." The cause was tried to the court without a jury. The court found in favor of the plaintiff, and on April 6, 1912, entered a decree requiring the defendants to convey to the plaintiff tracts "A" and "B," and the shore lands in front of tract "A," upon payment by the plaintiff to the defendants of certain sums due for rent, liens, taxes and shore lands, and giving the plaintiff ninety days after the entry of the decree, or in case of an appeal, ninety days after the filing of the remittitur in the superior court, to pay these sums. From this judgment, the defendants have appealed.

The questions which are chiefly material upon this appeal are: (1) had the rights of Richardson under the contract been forfeited; (2) did the appellants have the option to pay either in money or land; (3) did the trial court err in decreeing that the shore lands in front of tract "A" be conveyed; and (4) did the conditions and values so change during the delay as to render specific performance inequitable?

I. It is contended by the appellants that, because of the fact that the land was not cleared within the specified time, his right to claim compensation under the provisions of the contract had been forfeited. It is true that the administrator from time to time stated to Richardson that he was in default. It is also true that the administrator refused to accept the tendered payment of rent after the expiration of the period in which the clearing of the land was to have been completed. On the other hand, it is apparent that Richardson and those assisting him by way of advancements understood that, if the land were cleared, compensation would be made therefor as specified in the contract. The evidence makes it plain that the continuance of the work

was with the acquiescence and approval of those managing the Sears' estate. By the terms of the contract, the rent was to be \$250 for the first year, payable in quarterly installments, and \$925 thereafter, payable in like installments. The increased rental is not made to depend upon the question whether the land had been cleared at the time it was specified to begin. In order to have terminated the lease, it would have been necessary to serve written notice to pay rent or vacate the premises, as required by the statute. This was not done. Whether the appellants had the right to claim a forfeiture of that portion of the contract providing for the clearing, when the same had not been completed within the time specified, without forfeiting the lease, is a question we need not determine. Considering only that portion of the contract pertaining to the clearing, under all the facts and circumstances there was not a legal forfeiture. The indulgences extended to Richardson were such as to waive the right to a forfeiture. In *Douglas v. Hanbury*, 56 Wash. 63, 104 Pac. 1110, 134 Am. St. 1096, it is said:

"But the rule is equally well established that the right of forfeiture must be clearly and unequivocally proved, and that the right may be waived by extending the time for payment, or by indulgences granted to the purchaser."

II. On the question of the right to pay in money or land, it is contended that the contract is optional. In other words, that the Sears' estate may elect whether it will convey the land specified in the contract or make the compensation in money at the price named per acre. The general rule is that where the contract provides for payment in either one of two mediums, the debtor may elect within the time specified as to which he will make payment in. In 30 Cyc. 1219, the rule is stated thus:

"Where the contract provides for payment in either of two or more mediums, a debtor may elect to make either mode of payment at the time fixed therefor. But where a debtor has the election, either to pay in a particular kind of money, or

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in money or some other way, the right of election does not exist after the day when the payment becomes due, and if the promise is to pay in property or money the creditor is thereafter entitled to payment in money."

In the present case, however, this general rule does not apply. The excerpt from the contract above quoted makes it obvious that the payment was not to be made either in money or lands, at the option of the Sears' estate, but that the contract was to be performed by the conveyance of the tracts specified. The language in effect is that Richardson is to be compensated at the rate of \$125 per acre for the land improved by having conveyed to him a portion of the land at the valuation of \$700 per acre. That the parties did not intend the contract to be an optional one is manifest, not only from the language used in the excerpt quoted, but from other provisions of the contract. It is provided therein that, as security for the prompt payment of the rent and the fulfillment of other covenants and conditions of the lease by Richardson, "said lessors shall have a first lien by way of mortgage upon the lands to be hereafter set apart and conveyed to the lessees as compensation for the clearing and improvement hereinbefore provided." And also another covenant which provides "that the party of the second part (Richardson) neither as lessee nor as proprietor of the lands to be earned by him, will erect or permit to be erected upon said premises any structures . . . which shall be a nuisance to the neighborhood" The language used in the excerpt first above quoted, together with the other covenants to which reference has been made, makes it manifest that the intention of the parties was that the contract was to be performed by the conveyance of land, and was not intended to be in the alternative. In construing such contracts, the intention of the parties is to be ascertained, and when so ascertained, given effect. In 3 Parsons, Contracts (9th ed.), p. 240, it is said:

“The true question is, whether it was intended that the promisor might elect to pay the money or deliver the articles; or, in other words, whether it was agreed only that he owed so much money and might pay it either in cash or goods as he saw fit. There might be something in the form of the promise, in the *res gestae* or in the circumstances of the case, which, by showing the intention of the parties, would decide the general question; but, in the absence of such a guide, and supposing the question to be presented merely on the note itself, as above stated, we should say that the more reasonable construction would be, that it was an agreement for the delivery of goods in such a quantity as named, and of such a quality as that price then indicated. And on a breach of this contract, the promisor should be held to pay, as damages, the value of so much of such goods, at their increased or diminished price.”

The appellants, in support of their position that the contract is in the alternative, cite numerous authorities. From an examination of these, it appears that they are distinguishable from the present case, and that, with one exception, they fall within one of three classes: (1) Where the contract by its terms was in the alternative; (2) where no medium of value or exchange was expressed; and (3) where the contract was in the alternative and the debtor did not tender the property called for by the contract within the time specified and that therefore the creditor might elect to have it paid in money. The one authority cited which does not fall within any of these classes is the case of *Cock v. Blalock*, 1 Wash. Ter. 560. In that case the promise was to pay \$250 United States gold coin to be paid in good merchantable wheat at fifty cents per bushel. The court there, without giving reasons or citing authority, held that the contract was in the alternative, evidently being of the opinion that such construction gave effect to the intent of the parties. In deciding the present case, it is not necessary, however, for us to either overrule or follow that case, for the reason that the contract we are now considering makes it plainly obvious that it was

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not the intention of the parties that it should be in the alternative.

III. By the decree of the trial court, the appellants were directed to convey, in addition to the lands described in the contract, the shore lands in front of tract "A." This was error. The rights of the parties must be determined from the terms of the contract. There is nothing in the contract that justifies the inference that the parties thereto contemplated that it should cover shore lands.

IV. It is finally argued that, owing to the long delay in the completion of the clearing and the increase in the value of the property, it would be inequitable to decree a specific performance. But this position is not well founded. Richardson at all times prosecuted the work in good faith, and with such means as were available. The appellants not only acquiesced in the delay, but urged the completion of the work. The delay caused no substantial prejudice. The value of the property had greatly increased. But this alone is not sufficient to justify a denial of specific performance.

The cause will be remanded with direction to the superior court to modify the judgment as to the shore lands in accordance with the views herein expressed. The appellants will recover costs in this court.

ELIAS, FULLERTON, and MORRIS, JJ., concur.

[No. 11029. Department Two. July 30, 1913.]

THE STATE OF WASHINGTON, *Respondent*, v. C. M. PETTIT,
Appellant.¹

INDICTMENT AND INFORMATION—REQUISITES—DUPLICITY—LARCENY. An information charging larceny by color and aid of false pretenses and also as bailee or trustee, charges the commission of the offense in two ways specified by Rem. & Bal. Code, § 2601, and since they are not repugnant and proof of one means is not inconsistent with proof of the other, the information does not charge more than one crime and is direct and certain within the requirements of Rem. & Bal. Code, §§ 2057, 2059.

SAME—REQUISITES — ALTERNATIVE MEANS — JOINDER OF OFFENSES. Where a statute defining a crime specified different ways in which it may be committed, connecting the same with the disjunctive "or," an information may charge alternative means connecting the same with the conjunction "and."

CRIMINAL LAW—TRIAL—ADMISSIONS OF PROSECUTOR. An admission by the prosecuting attorney that a conviction was not expected under one of the alternative charges in the information, does not conclude the court or make it error to instruct the jury thereon; since the court is not controlled by the attitude of the prosecuting attorney.

CRIMINAL LAW—APPEAL—REVIEW—INSTRUCTIONS. Instructions are not to be reviewed as though standing alone, and are not erroneous if when read with the entire charge the jury were not misled.

CRIMINAL LAW—EVIDENCE—DECLARATION OF CONSPIRATOR. In a prosecution of two persons in which there was sufficient evidence that they were acting in concert with a common criminal design, evidence is admissible of a conversation between the prosecuting witness and one of the defendants when the other was not present.

CRIMINAL LAW—INSTRUCTIONS—FLIGHT. An instruction that flight was a material circumstance to be weighed and considered by the jury in connection with all other facts, that the term flight means that there had been a departure from the defendant's abode at the time of the crime due to fear, that it was for the jury to determine whether defendant's departure constituted flight, and if they believed there was a flight, then such fact tends to prove guilt, and must be given such weight as the jury should believe it entitled to, is not, when taken as a whole, objectionable as failing to tell the jury that evidence of flight is not sufficient in itself to establish guilt; since the jury must have understood that it was not.

¹Reported in 133 Pac. 1014.

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Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered May 4, 1912, upon a trial and conviction of grand larceny. Affirmed.

Morris & Shipley and Hulbert & Husted, for appellant.

Ralph C. Bell and O. T. Webb, for respondent.

MAIN, J.—The defendant, together with Florence Pettit, his wife, were charged by information with the crime of grand larceny. The information, so far as material at present, was as follows:

“On or about the 2d day of January, 1912, in the county of Snohomish, state of Washington, the said defendant, C. M. Pettit, and the said defendant, Florence Pettit, then and there being, did unlawfully, and with intent to deprive and defraud the owner thereof, obtain from one Hattie Martin the sum of twenty-nine hundred dollars (\$2,900), in lawful money of the United States of America, of the value of twenty-nine hundred dollars (\$2,900), in lawful money of the United States of America, the personal property of said Hattie Martin, then and there in the lawful care, custody, possession and control of said Hattie Martin, by color and aid of the false representations and pretenses by said defendant, C. M. Pettit, and said defendant, Florence Pettit, then there knowingly, intentionally and fraudulently made, that creditors of one Oscar Martin were about to subject and seize and would subject and seize said personal property and money in satisfaction of claims against said Oscar Martin, and that it was essential and necessary in order to save, preserve and protect said personal property and money to said Hattie Martin that the same should be placed in the care, custody, possession and control of them, said defendant C. M. Pettit, and said defendant, Florence Pettit; all of which false representations and pretenses so knowingly, intentionally and fraudulently made by said defendant, C. M. Pettit, and said defendant, Florence Pettit, were believed by said Hattie Martin, who, relying thereon and being deceived thereby and induced thereby so to do, did then and there deliver, pay and surrender said personal property and money aforesaid to said defendant, C. M. Pettit, and said defendant, Florence Pettit, and the said defendant, C. M. Pettit, and said de-

fendant, Florence Pettit, did then and there receive and obtain said personal property and money aforesaid, with the understanding and agreement then and there had between said Hattie Martin and said defendant, C. M. Pettit, and said defendant, Florence Pettit, that they, the said defendant, C. M. Pettit, and the said defendant, Florence Pettit, would safely hold, keep and preserve said personal property and money for said owner thereof as bailees and trustees thereof; and they, the said defendant, C. M. Pettit, and said defendant, Florence Pettit, having then and there received and obtained said personal property and money as aforesaid, did then and there unlawfully and with intent to deprive and defraud the said owner thereof, secrete, withhold and appropriate said personal property and money to their own use and to the use of some person or persons unknown to your informant other than the true owner thereof and the person entitled thereto, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Washington."

To this information a demurrer was interposed upon various grounds, but chiefly upon the ground that two crimes are charged. The demurrer was by the court overruled. The defendant pleaded not guilty. A separate trial being granted to C. M. Pettit, on April 3, 1912, the cause was tried before the court and a jury. At the opening of the trial, the defendant moved the court for an order requiring the state to elect upon which of the two offenses alleged to be charged in the information it would proceed; that is, whether the defendant was to be tried for the alleged crime of larceny by color or aid, etc., as defined in subd. 2, Rem. & Bal. Code, § 2601 (P. C. 135 § 695), or for larceny by bailee or trustee, as defined in subd. 3 of the same section. This motion was denied. During his closing argument to the jury, the prosecuting attorney stated that he did not expect a conviction under the first form of crime as charged in the information, it not being intended for that purpose. Thereupon the defendant moved the court for an order withdrawing from the consideration of the jury all the evidence ad-

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mitted during the trial in support thereof, and that the jury be instructed to disregard the same. The motion was denied. The defendant was found guilty by the verdict of the jury. Motion for a new trial and motion in arrest of judgment being made in due time, both were overruled. Thereupon sentence was imposed. The defendant appeals.

The evidence in behalf of the state tends to prove substantially the following facts: During the months of August and September, in the year 1911, Hattie Martin, the complaining witness, and her husband, Oscar Martin, first became acquainted with the defendants C. M. Pettit and Florence Pettit, his wife. The Martins and the Pettits were at that time living in houses adjacent to each other in the city of Everett, Washington. Sometime thereafter the Martins rented and moved into the upstairs rooms in the house then occupied by the Pettits. On December 4, 1911, the Martins sold the moving picture business which they for a year prior thereto had been operating. As a part of the proceeds of this transaction, there came into the possession of Mrs. Martin the sum of \$3,197. This she deposited in her own name in the Everett Trust & Savings Bank. About this time Mr. Martin was advised of court proceedings which had been begun against him in Minnesota to subject certain real estate which he there owned to the payment of a debt. Whether at this time there were creditors in Everett demanding payment of claims against the Martins was a disputed question upon the trial.

On December 15, 1911, Mr. Martin departed from Everett for Minnesota. As soon as Mrs. Pettit knew that Mr. Martin was going east, she represented that Mr. Pettit and his father had said that Mrs. Martin should not leave her money in the bank. On account of the proceedings which had been instituted it was not safe. Influenced by what was said and the advice so received, she endorsed the draft which the bank had issued to her and delivered it to Mrs. Pettit, who obtained the money from the bank and brought it to the

after date to the order of Hattie Martin, with interest at six per cent from January 2, 1912, payable "semi-yearly." At the bottom of the note on the due date line was filled in "Jan. 2, 1913." A line was struck through "6%" and "Jan. 2, 1912" (the rate of interest and the date from when the interest was payable), in the body of the note. The defendant signed the note, and, at his request, Mrs. Martin signed her name under his signature, he stating that this was necessary to show that the money belonged to her. Of the \$2,945 which had been brought from the bank Mr. Pettit took \$2,900. He stated that Mrs. Martin might need the \$45 remaining, and insisted upon her keeping it, which she did. Mrs. Martin took the note, read it and kept it. She asked the defendant where he was going to put the money, and he stated that he would put it in the First National Bank of Everett, and that all Mrs. Martin would have to do would be to take the note to the bank any day and her money would be there; that she could cash the note in California, or any place.

That same day the defendant left Everett for Seattle, stating that he would return the following Saturday. His father received a letter from him written at Seattle, in which he stated that he was going to Bremerton to see about getting some work there. After returning from Bremerton, he went to Kent, then returned to Seattle, and on January 4, 1912, left by rail for San Diego, California; a few days later he went to Los Angeles. No communication of any kind was received from him by his wife or father advising them that he was going to San Diego. To Mrs. Martin, Mrs. Pettit evinced great anxiety at not hearing from her husband, she stating that she feared he had met with foul play, or that he had left her. On January 11, 1912, she left for Seattle, stating to Mrs. Martin that she expected to return the next day. She had, however, prior to leaving for Seattle, packed her trunks and engaged passage by boat for Los Angeles. She departed from Seattle on January 11, 1912, arriving in due course at Redondo, the harbor situated about 35 miles

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from Los Angeles. Here she was met by the defendant. Mrs. Pettit not returning from Seattle as she had stated that she would, Mrs. Martin talked with the father of defendant, who informed her that Mrs. Pettit had gone to California, and he expressed surprise that Mrs. Pettit had not informed her where she was in fact going.

On January 8, 1912, Mrs. Martin took the note to the First National Bank, where the defendant had said he would leave the money, and left it with the collection teller, who asked her if she wished it put to her credit, to which she replied that she did. Upon being asked if she wanted any money, she replied, "No, not now." She inferred from the conversation had with the collection teller that the money was in the bank. On January 13, 1912, she presented the receipt which the teller had given her for the note and demanded some money, and it was then that she was informed that there was no money in the bank for her; that it had not been left there by the defendant. Thereafter, and on February 15, 1912, the defendant and his wife were taken into custody at Los Angeles, California, by the sheriff of Snohomish county, they having theretofore been arrested upon the charge contained in the information in this case. After their arrest, Mr. Pettit turned over to the sheriff \$2,400 of the identical money that he had received from Mrs. Martin, \$500 having been used by the defendant. The facts as above stated were in many particulars disputed by the defendant's evidence. The defendant also introduced evidence explanatory of the transactions, which, if true, were consistent with innocence and inconsistent with guilt. A further view of the evidence, however, would serve no useful purpose, for the reason that the jury evidently believed the facts to be as contended for by the state. These, then, upon this appeal, must be accepted as the facts in the case.

The questions to be determined are: (1) does the information charge more than one crime; (2) was it error to submit to the jury the two means by which the alleged crime might

be committed; (3) did the instructions of the court submit to the jury false pretenses other than those charged; (4) did the evidence show concert of action sufficient to charge the defendant with statements made by his wife; (5) did the court correctly instruct on the matter of flight; and (6) was error committed in ruling upon the admissibility of evidence.

I. It is argued that the information charges more than one crime, and therefore offends against the statutory mandates. Rem. & Bal. Code, § 2057 (P. C. 135 § 1019), requires that the information be direct and certain as regards the party charged, the crime charged, and the particular circumstances of the crime when they are necessary to constitute a complete crime. Section 2059 (P. C. 135 § 1023), requires that the information must charge but one crime and in one form only, except that where the crime may be committed by the use of different means, the information may allege the means in the alternative. Section 2601 (P. C. 135 § 695), being a section of the criminal code of 1909, defines the crime of larceny, and in its subdivisions specifies varying ways in which such crime may be committed. Giving consideration to the language of this statute, it appears that the legislature therein intended to define but one crime, that of larceny, and to state the different ways in which the crime might be committed.

The information charges the crime with which the defendant is charged, with having been committed in two of the ways specified in the statute, (1) by color and aid of false and fraudulent representations, and (2) by a bailee or trustee. Does this manner of charging the crime conform to the legislative enactments? The general rule is that, where a single offense may be committed in different ways or by different means, it may be charged in the information to have been committed by more than one of the ways or means, provided the ways or means charged be not repugnant to each other. In *State v. O'Neil*, 51 Kan. 651, 33 Pac. 287, 24 L. R. A. 555, it is said, quoting from Bishop's Criminal Procedure:

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"We have seen that, if an offense may be committed by different means, and the pleader doubts which was employed in the particular instance, he may in one count charge its commission by all, and proof of any one will sustain the allegation. The limit to this doctrine is, that the means must not be repugnant."

To the same effect see 22 Cyc. 379, and cases there cited.

The varying ways by which a crime may be committed are not repugnant to each other unless the proof of one will disprove the other. The defendant here was charged with having committed the crime of larceny by color and aid of false pretenses, and also as bailee or trustee. The proof that the crime was committed by color and aid would not necessarily be inconsistent with proof that, under an agreement with the parties subsequently made, the defendant became a bailee or trustee. Neither would proof that tended to establish that the alleged crime had been committed by a bailee or trustee necessarily disprove a charge that the possession of the property had been originally obtained by color and aid of false or fraudulent pretenses. The case of *People v. Kane*, 43 App. Div. 472, 61 N. Y. Supp. 195, cited and relied upon by the appellant, is distinguishable from the present case in that there was a repugnancy, because the proof establishing one of the crimes charged disproved the possibility of the other. Some contention is made that, inasmuch as the statute connects the different means by which the crime may be committed with the disjunctive "or," they cannot be joined in the information by the conjunction "and." But this position does not appear to be sustained by the authorities. In 1 Bishop's New Criminal Procedure (2d ed.), § 436, it is said:

"A statute often makes punishable the doing of one thing *or* another, *or* another, sometimes thus specifying a considerable number of things. Then, by proper and ordinary construction, a person who in one transaction does all, violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore the indictment on such a statute may allege, in a single count,

that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction *and* where the statute has "or," and it will not be double, and it will be established at the trial by proof of any one of them."

We think the information is direct and certain, and charges, in ordinary and concise language, but a single crime.

II. The court in submitting the case to the jury defined the two means by which it was alleged that the crime had been committed, and the jury were told that if they found either to be established by the evidence, they might return a verdict of guilty. It is argued that this was error because (1) it was permitting the jury to deliberate upon either of two crimes and return a verdict according to their findings upon the evidence. The answer to this contention is found in what has previously been said; for if the information were properly drawn, it was not error to cover it by the instructions. (2) There was no evidence that the crime had been committed in the first manner charged, that is, by color and aid. An examination of the record, however, discloses that there was sufficient evidence to carry this question to the jury. And (3) the court refused to withdraw from the consideration of the jury the first form of crime charged, after the prosecuting attorney in his closing argument had stated that a conviction upon that was not expected. In this we think that the court committed no error. If, in his opinion, there was sufficient evidence of that means of the commission of the crime to sustain a conviction, it was his duty to submit it to the jury. The court was not controlled by the attitude of the prosecuting attorney.

III. Our attention is called to two instructions of the court wherein it is claimed that, under the language there used, the jury were authorized to convict the defendant in the event that they should find that *any* false representations were made, whether they be those charged in the information, or different from the ones charged. If the two instructions complained of stood alone, there might be merit in this con-

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tention. But when these instructions are read in connection with the entire charge, it does not seem that the jury could have been misled thereby. When the instructions are read in their entirety, it appears clear that the court was submitting to the jury, not whether the defendant made *any* false representations, but whether he made those that were charged in the information.

IV. Complaint is also made of the instructions wherein the jury were told that if they believed the false representations made by Anna Florence Pettit, the wife of the defendant on trial, they might return a verdict of guilty. But these instructions do not violate the well settled rule in this state that, where there is a prosecution of two persons, evidence of a conversation between the prosecuting witness and one of the defendants when the other was not present is admissible if the facts show a concert of action and that both defendants were parties to the crime, even though the defendants had elected to have separate trials. *State v. Williams*, 62 Wash. 286, 113 Pac. 780; *State v. Baker*, 69 Wash. 589, 125 Pac. 1016; *State v. Andrews*, 71 Wash. 181, 127 Pac. 1102. There is sufficient evidence that the defendant and his wife were acting in concert with a common criminal design to make the declarations of the wife admissible in evidence as against her husband, the defendant. Where concert of action is shown, every party thereto becomes a party to the previous as well as the subsequent acts of others in furtherance of the common design. In 1 Greenleaf on Evidence (16th ed.), § 184a, it is said:

“Every one who does enter into a common purpose or design is generally deemed, in law, a party to every act which had before been done by the others and a party to every act which may afterwards be done by any of the others in furtherance of such common design.”

V. Error is predicated upon the instruction given upon the question of flight. This instruction was in substance as follows: That flight was a material fact and circumstance

to be weighed and considered by the jury in connection with all the other facts and circumstances in determining the defendant's guilt or innocence; that the term flight, as used in the instruction, meant that there had been a departure from the defendant's residence or abode at the time the crime was alleged to have been committed, which was due in some degree to fear of arrest or consciousness of guilt; that the undisputed fact was that the defendant had departed from his residence in Snohomish county and was arrested at a later date in the state of California; that it was for the jury to determine from all the evidence whether such departure constituted flight as that term was defined in the instruction; that if the jury believed there was a flight on the part of the defendant, then such fact and circumstance tends to prove guilt, and must be given such weight and effect in favor of guilt as the fair and honest judgment of the jury should believe it entitled to. The law is that evidence of flight is insufficient in itself to establish guilt, but may be taken into consideration with all the other facts and circumstances of the case in determining whether or not the person charged with crime is in fact guilty. *State v. Stentz*, 33 Wash. 444, 74 Pac. 588. To constitute flight it is not necessary that there should be an escape from jail or from an officer, but it may consist in a departure from the place of the crime by one conscious of guilt, even before suspected of the crime. In *State v. Deatherage*, 35 Wash. 326, 77 Pac. 504, it is said:

"It is not necessary, in order to prove the flight of one charged with crime, to show that he escaped from jail or from an officer having him in custody, for it often happens that persons conscious of guilt seek safety by flight, even before they are suspected of crime. 'The wicked flee when no man pursueth.'"

The concluding part of the instruction, which in effect told the jury that if they found there was a flight on the part of the defendant, such was a fact or circumstance that

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tended to prove guilt and should be given such weight and effect as the jury thought it fairly entitled to, states a proposition which the authorities support. In *George v. State*, 61 Neb. 669, 85 N. W. 840, it is said:

“Objection is further made because evidence was admitted as to the acts of the defendant in leaving the place where he had been staying soon after the commission of the alleged crime, and going to another part of the state, apparently to escape arrest and prosecution. This evidence was proper, and to be considered by the jury, to be given such weight only as they thought it entitled to in view of all the other facts and circumstances of the case.”

In the first part of the instruction, it is stated that flight is a fact or circumstance which the jury may take into consideration in connection with all the other facts and circumstances in determining the defendant's guilt or innocence. It is true that the instruction in no place in express language tells the jury that evidence of flight is not sufficient in itself to establish guilt. But when the instruction is read as a whole, it seems clear that the jury must have understood that flight was not sufficient in itself, but that it was to be taken into consideration with all the other facts and circumstances of the case, and given such weight as the jury might think it entitled to.

VI. Finally, it is urged that the court erred in ruling upon the admissibility of evidence. But in this regard we think that the record discloses no prejudicial error.

The judgment will be affirmed.

ELLIS, FULLERTON, and MORRIS, JJ., concur.

[No. 10856. Department Two. July 31, 1913.]

E. R. BUTTERWORTH, *Respondent* v. REA F. BREDEMEYER,
Appellant.¹

TRIAL—DIRECTION OF VERDICT—PROVINCE OF COURT AND JURY—QUESTIONS FOR JURY. Upon a challenge to the sufficiency of the evidence to sustain a partial defense to the action, the court, upon properly denying the challenge, should submit that issue to the jury and take its verdict thereon, together with its verdict on the other defenses, and it is error to take the verdict upon the main defenses only, and then set the verdict aside and determine the remaining questions of fact without the aid of the jury.

ALTERATION OF INSTRUMENTS—EVIDENCE—SUFFICIENCY. Where defendant testified positively that the contract sued on had been materially altered, and her testimony was corroborated in minor particulars by one witness and by various circumstances, there is abundant evidence to support a finding in favor of the defendant, although she was contradicted as to the alteration.

HUSBAND AND WIFE—LIABILITY OF WIFE FOR FUNERAL EXPENSES. Under Rem. & Bal. Code, § 1568, making the funeral expenses a preferred claim against the estate, the wife's liability for her husband's funeral expenses is secondary and not primary, and in the absence of an express promise cannot be enforced until the creditor has exhausted his remedy against the estate.

SAME—IMPLIED PROMISE. A mere direction to furnish service for a husband's funeral is presumed to be made on the faith of the credit of the estate, and does not imply a promise to pay for the same.

Appeal from a judgment of the superior court for King county, Ronald, J., entered May 23, 1912, in favor of the plaintiff, notwithstanding the verdict of a jury rendered in favor of the defendant, in an action on contract. **Reversed.**

Jay C. Allen, for appellant.

Karr & Gregory, for respondent.

FULLERTON, J.—The respondent, plaintiff below, brought this action against the appellant to recover for services rendered and for funeral supplies furnished and used at the

¹Reported in 133 Pac. 1061.

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funeral of the appellant's husband. The cause was before this court in *Butterworth v. Bredemeyer*, 62 Wash. 134, 113 Pac. 253, in which the complaint, aided by the bill of particulars, was held sufficient to state a cause of action. The complaint, with the aid of a writing set forth in the bill of particulars, showed an express promise on the part of the appellant to pay for the services and furnishings a fixed sum of money. On the return of the cause to the superior court, the appellant answered, denying the material allegations of the complaint and pleading affirmatively that there had been a material alteration in the writing set forth subsequent to the time the appellant placed her signature thereto. A reply was filed to the answer, and on the issues made, the cause was tried before a jury, which returned a verdict in favor of the appellant. This verdict, on the motion of the respondent, was set aside by the court. The court, however, found that the contract had not been performed in its entirety, even as it found it written, and entered judgment for the amount shown by the writing to be due, less a sum he found would compensate the appellant for the failure to perform the contract in its entirety. From the judgment so entered, the present appeal is taken.

The court set aside the verdict of the jury on the ground that the evidence was insufficient to justify the finding that a material alteration had been made in the writing subsequent to its execution by the appellant. But if we concede this conclusion to be justified, there was still error in the action of court when it directed judgment to be entered for the respondent. If it be true that the evidence did not justify a finding that the writing relied upon for a recovery had been materially altered, but did justify a finding that it had been only partially performed, permitting of a recovery only for a lesser sum than the amount stated in the writing to be due, then the proper procedure was to so instruct the jury and take their verdict on the recovery properly to be allowed. This the court did not do, although its atten-

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E. R. BUTTERWORTH, *Respondent* v. REA F. BREDEMEYER,
Appellant.¹

TRIAL—DIRECTION OF VERDICT—PROVINCE OF COURT AND JURY—QUESTIONS FOR JURY. Upon a challenge to the sufficiency of the evidence to sustain a partial defense to the action, the court, upon properly denying the challenge, should submit that issue to the jury and take its verdict thereon, together with its verdict on the other defenses, and it is error to take the verdict upon the main defenses only, and then set the verdict aside and determine the remaining questions of fact without the aid of the jury.

ALTERATION OF INSTRUMENTS—EVIDENCE—SUFFICIENCY. Where defendant testified positively that the contract sued on had been materially altered, and her testimony was corroborated in minor particulars by one witness and by various circumstances, there is abundant evidence to support a finding in favor of the defendant, although she was contradicted as to the alteration.

HUSBAND AND WIFE—LIABILITY OF WIFE FOR FUNERAL EXPENSES. Under Rem. & Bal. Code, § 1568, making the funeral expenses a preferred claim against the estate, the wife's liability for her husband's funeral expenses is secondary and not primary, and in the absence of an express promise cannot be enforced until the creditor has exhausted his remedy against the estate.

SAME—IMPLIED PROMISE. A mere direction to furnish service for a husband's funeral is presumed to be made on the faith of the credit of the estate, and does not imply a promise to pay for the same.

Appeal from a judgment of the superior court for King county, Ronald, J., entered May 23, 1912, in favor of the plaintiff, notwithstanding the verdict of a jury rendered in favor of the defendant, in an action on contract. Reversed.

Jay C. Allen, for appellant.

Karr & Gregory, for respondent.

FULLERTON, J.—The respondent, plaintiff below, brought this action against the appellant to recover for services rendered and for funeral supplies furnished and used at the

¹Reported in 133 Pac. 1061.

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funeral of the appellant's husband. The cause was before this court in *Butterworth v. Bredemeyer*, 62 Wash. 134, 113 Pac. 253, in which the complaint, aided by the bill of particulars, was held sufficient to state a cause of action. The complaint, with the aid of a writing set forth in the bill of particulars, showed an express promise on the part of the appellant to pay for the services and furnishings a fixed sum of money. On the return of the cause to the superior court, the appellant answered, denying the material allegations of the complaint and pleading affirmatively that there had been a material alteration in the writing set forth subsequent to the time the appellant placed her signature thereto. A reply was filed to the answer, and on the issues made, the cause was tried before a jury, which returned a verdict in favor of the appellant. This verdict, on the motion of the respondent, was set aside by the court. The court, however, found that the contract had not been performed in its entirety, even as it found it written, and entered judgment for the amount shown by the writing to be due, less a sum he found would compensate the appellant for the failure to perform the contract in its entirety. From the judgment so entered, the present appeal is taken.

The court set aside the verdict of the jury on the ground that the evidence was insufficient to justify the finding that a material alteration had been made in the writing subsequent to its execution by the appellant. But if we concede this conclusion to be justified, there was still error in the action of court when it directed judgment to be entered for the respondent. If it be true that the evidence did not justify a finding that the writing relied upon for a recovery had been materially altered, but did justify a finding that it had been only partially performed, permitting of a recovery only for a lesser sum than the amount stated in the writing to be due, then the proper procedure was to so instruct the jury and take their verdict on the recovery properly to be allowed. This the court did not do, although its atten-

tion was called to the proper practice by the attorney for the respondent. It submitted the question of the alteration of the instrument to the jury, took their verdict thereon, and then set the verdict aside and determined the remaining questions of fact without the aid of the jury. Unless the right of trial by jury no longer remains inviolate in this state, this was manifest error.

But we think the court erred in setting aside the jury's verdict on the principal question of fact involved. The promise sued upon was written on a bill-head of the respondent. Omitting the advertising matter, it read as follows:

"Seattle, Wash., May 10, 1910.

"Mrs. Rea F. Bredemeyer, to E. R. Butterworth & Sons, Dr.

Solid oak black casket,

3 hacks and pall coach,

Funeral car,

Incineration fee,

Partial embalming and all services for funeral of
J. A. O. Bredemeyer \$393.00

"O. K. as arranged and payment guaranteed inside of
thirty days. Rea F. Bredemeyer."

The evidence does not disclose who summoned the respondent to the appellant's residence on the death of her husband, but it appears that a representative of the respondent appeared there on the evening of the day of the husband's death and laid out the body, and that on the next morning another representative appeared to ascertain what arrangements were desired for the funeral. The evidence is in conflict as to the occurrences between the appellant and this representative; but the appellant testified that, in answer to the representative's inquiry as to the character of funeral desired, she stated to him that her husband desired to be cremated, and that while she wanted the funeral neat, she wished it made as inexpensive as possible; that they looked over a catalogue containing descriptions and pictures of caskets, and that the agent pointed out one of solid oak as suitable for the purpose; that she inquired if a less expensive one might not

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answer the purpose inasmuch as the body was to be cremated, but was assured by the representative that the solid oak casket was the only one suitable for the purpose, and that she consented to the selection of the particular casket on the faith of his representations; that other furnishings were talked over, and as they were agreed upon, the representative would put them down on a paper; that after they had concluded, he passed the paper over to her and requested her signature upon it; that she inquired as to the purpose of having her sign it, and was assured that it was "only to show the office that this is what you want." She testified further that nothing was said about prices during the negotiations; that she was not asked to, and did not, guarantee payment of the furnishings selected; that the cost of the same was not written on the paper when she put her name thereto, nor was any guarantee of payment written thereon.

The appellant was corroborated as to the conversation that occurred between herself and the representative by a lady, a neighbor of the appellant, who stood at the back of appellant's chair while the arrangements were being made. The witness, however, was not able to say what was written on the paper prior to the signing by the appellant. While she corroborates the appellant as to the purpose for which the representative stated he desired the appellant's signature, she did not examine the writing sufficiently close to know what it contained. There were other circumstances shown, also, which lend color to the appellant's version of the transaction. There is a printed form of guaranty on the back of the paper, prepared for execution in the presence of a witness, which it seems might have been used had the transaction been entirely open and aboveboard; the casket selected was excessively large (so much so, indeed, that it could not be carried through the hallway of the house, and had to be put in and taken out through a window), while Mr. Bredemeyer was a very small man, and when placed therein, "looked like a child" in comparison with his surroundings; and the repre-

sentative when testifying to the occurrences at the time, puts a phrase into the mouth of appellant which she testified she never uses, and which it appears she could hardly have used, even had she been addicted to it, under the circumstances shown here.

But it is not necessary to pursue the inquiry. There was here abundant evidence to carry the question of the guarantee to the jury, and the court was right in submitting the question of fact to them in the first instance, but in error in setting aside the verdict on the ground that the evidence was insufficient to support their finding.

The respondent argues that a promise to pay for funeral services and findings arises from the order given to furnish them, and that in this case a recovery can be had against the appellant on the implied promise, even if the proofs of the direct promise fail. It may be that a wife is liable for the reasonable funeral expenses of her husband whether she expressly promises to pay for them or not (*Butterworth & Sons v. Teale*, 54 Wash. 14, 102 Pac. 768); but in the absence of an express promise, her liability therefor is secondary and not primary. As was held by the supreme judicial court of Maine in *Phillips v. Phillips*, 87 Me. 324, 32 Atl. 963, the necessity of a decent burial arises immediately after the decease, and the law, both ancient and modern, pledges the credit of the estate for the payment of such reasonable sums as may be necessary for that purpose, even though such expenses may have been incurred after the death and before the appointment of an administrator. In this state the funeral expenses of a deceased person are made by statute a preferred charge against his estate. Rem. & Bal. Code, § 1568 (P. C. 409 § 553); *Cunningham v. Lakin*, 50 Wash. 394, 97 Pac. 447. Under this statute, the liability of the estate must be regarded as primary, and the rule in such a case, as in other cases of primary and secondary liability, is that the creditor must exhaust his remedy against the primary fund before he can resort to the secondary fund. It is not denied, of

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course, that an express promise to pay the expenses of a funeral will create a primary liability against the person so promising, but it is meant that nothing less than an express promise will create such a liability. In other words, a mere direction to furnish such service and supplies is presumed to be made on the faith of the credit of the estate, and nothing short of an order and an express promise to pay for the furnishings by the person giving the order will create a primary liability on his part.

The judgment is reversed, and remanded with instructions to overrule the motion for judgment *non obstante veredicto*, and proceed to a final judgment in the cause in accordance with the usual course of practice.

MAIN, ELLIS, and MORRIS, JJ., concur.

[No. 11085. Department Two. July 31, 1913.]

CATHERINE BOYLE, *Respondent*, v. F. J. BOYLE, *Appellant*.¹

DIVORCE—ALIMONY—ENFORCEMENT—CONTEMPT PROCEEDINGS—DEFENSES. A divorced husband cannot be adjudged guilty of contempt in failing to pay the alimony awarded where it appears by clear and satisfactory evidence that he has neither the means nor the ability to do so.

Appeal from an order of the superior court for King county, Frater, J., entered December 7, 1912, adjudging defendant guilty of contempt in violating an order for the payment of alimony. Reversed.

Charles H. Miller, for appellant.

Herbert W. Meyers and *Charles A. Enslow*, for respondent.

MAIN, J.—This is a proceeding wherein the plaintiff seeks to have the defendant adjudged to be in contempt of court for his failure to pay alimony.

¹Reported in 133 Pac. 1009.

On the 19th day of October, 1909, by decree of court, the bonds of matrimony theretofore existing between the plaintiff and the defendant were dissolved. By the decree the defendant was ordered to pay to the plaintiff as alimony the sum of \$25 per month. This decree not being conformed to by the defendant, on May 27, 1912, the plaintiff made an application to the superior court for an order directed to the defendant requiring him to show cause on the 10th day of June, 1912, why he should not be adjudged guilty of contempt for failure to conform to the court's decree. On June 11, 1912, the matter came on for hearing upon the show cause order. Thereupon the court adjudged the defendant to be in contempt of court, and suspended sentence providing the defendant would on or before July 1, 1912, pay to plaintiff the sum of \$10, and every thirty days thereafter the sum of \$15. The order provided further that if the defendant should fail to make these payments as indicated, he would be subject to arrest on the charge of contempt. Thereafter no payments were made as required in the order of June 11, 1912. On October 21, 1912, the defendant was arrested and appeared before the court to answer the charge of contempt. The matter was heard on November 23, 1912, and on November 26, 1912, the court signed an order permitting the defendant to file affidavits in his defense as of the date of the hearing. On December 7, 1912, an order was entered adjudging the defendant in contempt of court for failure to obey the order made on June 11, 1912, and committing the defendant to the county jail until he should purge himself of such contempt. The defendant appeals.

The cause is before us upon the affidavits filed by the respondent and her counsel in support of her application for the show cause order, and the affidavits filed on behalf of the appellant in support of his defense. The certificate of the trial judge to the bill of exceptions states that these affidavits contain all the facts and all the evidence and proofs submitted by the respective parties upon the hearing.

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The affidavits of the respondent are to the effect: That the alimony awarded in the divorce decree has not been paid; that the appellant was able to pay; and that the respondent was ill and very much in need of the financial support which the payment of the alimony would furnish.

The appellant's affidavits, and one of these is by his physician, are to the effect, that the appellant has not the means and is unable to pay the alimony; that he is an old man and is suffering with diseases known as creeping paralysis of the arms, muscular atrophy, and a severe inguinal hernia; that if he is incarcerated in the county jail it will be deleterious to his health; that he is not in a condition to perform manual labor; that he owes his physician \$125; that he owes his counsel for services rendered in these proceedings, and his counsel is appearing for him without hope of compensation; that all of his property has been conveyed to the respondent; that one C. E. Preston has rendered appellant financial assistance, without hope of reward, in order to save him from becoming a public charge, and appellant is now indebted to him in the sum of several hundred dollars. Appellant's affidavits stand undenied.

The one question to be determined is, whether the decree is warranted by the facts as contained in these affidavits.

The rule is that a defendant is not guilty of contempt of court for failure to pay alimony where it appears by clear and satisfactory evidence that he has neither the means nor the ability to do so, and that his disobedience, therefore, is not wilful. In the case of *Holcomb v. Holcomb*, 53 Wash. 611, 102 Pac. 653, it was said:

"The sole defense to the show cause order was that the appellant had neither the means nor the ability to comply with the terms of the decree. If this defense was established by clear and satisfactory proof the judgment must be reversed, for it is always a defense to a proceeding of this kind to show that the disobedience was not willful, but was the result of pecuniary inability or other misfortunes over which the accused had no control. *Walton v. Walton*, 54 N. J. Eq. 607,

35 Atl. 289; *Newhouse v. Newhouse*, 14 Ore. 290, 12 Pac. 422; *Peel v. Peel*, 50 Iowa 521; *Schuele v. Schuele*, 57 Ill. App. 189; 9 Cyc. 14."

The present case comes directly within the rule there announced. The judgment must therefore be reversed.

ELLIS, FULLERTON, and MORRIS, JJ., concur.

[No. 11141. Department One. August 1, 1913.]

FRANK BUTY, *Appellant*, v. JULIA GOLDFINCH, *Respondent*.¹

LIMITATION OF ACTIONS—AS BAR TO DEFENSE—TAX TITLE. Rem. & Bal. Code, § 162, providing that an action to set aside a tax deed or recover land sold for taxes must be brought within three years from the date of the tax deed, cannot be invoked against a defendant in possession to preclude a defense that the tax deed was void, when sued in ejectment by the tax title holder after the expiration of the three years limited.

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 30, 1912, upon findings in favor of the defendant, in an action of ejectment, after a trial to the court. Affirmed.

William C. Keith, for appellant.

A. G. McBride and *H. S. Tremper*, for respondent.

PARKER, J.—The plaintiff commenced this action in the superior court, seeking recovery of real property, claiming title thereto under a tax deed executed by the treasurer of King county, in pursuance of a tax foreclosure judgment rendered in the superior court of that county. The defendant being in possession of the property, and claiming to have been in possession ever since prior to the tax foreclosure, defended upon the ground, among others, that the tax foreclosure judgment and deed were void for want of jurisdic-

¹Reported in 133 Pac. 1057.

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tion, because there was no service of any process whatever in the foreclosure action, either personal or constructive, upon either of the defendants therein named; this defendant and her then husband being named as the defendants therein, they being the record owners as well as the actual owners of the property, and it being their community property. This defense was met by the plaintiff by denial of the alleged want of service in the tax foreclosure action, and by invoking the three-year statute of limitation against actions to set aside and cancel tax deeds. A trial before the court resulted in findings and judgment in favor of the defendant, and in quieting her title as against the claims of the plaintiff, reserving a lien upon the property in his favor for a small sum on account of taxes paid by him thereon. From this disposition of the cause, the plaintiff has appealed to this court.

On May 1, 1903, and for several years prior thereto, respondent was the wife of T. B. Daly. On that day they were divorced. While they were husband and wife, they acquired title to the property herein involved, as their community property, taking title thereto in the name of the husband, T. B. Daly. The property was then wild, unimproved and unoccupied. Soon thereafter and prior to their divorce, they commenced to clear and improve the property, doing sufficient work thereon to render plainly visible their actual physical possession thereof. The trial court found, in substance, that respondent's possession of the property thus commenced was thereafter open, notorious and continuous until the trial of this action in October, 1912.

In November, 1903, Rosa D'Elia, claiming to be the owner of a delinquent tax certificate against the property, commenced an action in the superior court of King county to foreclose the same, by filing therein her application in usual form. Thereafter judgment of foreclosure was rendered in that action in her favor. Thereafter sale of the property was made by the treasurer of King county in pursuance of

that judgment, when he executed a tax deed to Rosa D'Elia
✓ on January 23, 1904, she being the purchaser at that sale. Thereafter appellant acquired, by mesne conveyances, whatever right, title, or interest in the property Rosa D'Elia had acquired by the tax foreclosure and sale; and on February 23, 1912, commenced this action against respondent to recover possession of the property. The commencement of this
✓ action, it will be noticed, was over eight years after the execution of the tax deed upon which appellant rests his claim to the property.

In March, 1906, T. B. Daly conveyed all his interest in the property to respondent, his former wife, the decree of divorce not having divested either of them of their interest therein. In November, 1911, respondent was married to Geo. E. Goldfinch, and they are now husband and wife. While he was made a defendant in this action and is, with his wife, in possession of the property, he disclaims all interest therein. We, therefore, refer to her alone as the defendant and respondent.

✓ The trial court found, in substance, that no service of summons or process, either personally or by publication, was made in the tax foreclosure action upon T. B. Daly, the then record owner, or upon respondent, his former wife and joint owner, or upon any person whomsoever. The trial court not only found that the respondent was in the open and notorious possession of the property at all times since the commencement of the tax foreclosure action, but also that she had made valuable and lasting improvements thereon, at a cost to her of not less than \$900, and that she has paid all general taxes charged against the property for the years 1903 to 1911, inclusive, except the year 1906, for which year she tendered payment to the county treasurer, which tender was refused by the treasurer because some other person had previously paid the taxes for that year. Neither appellant, nor any of his predecessors in interest, including Rosa D'Elia, were ever in possession of the property, nor did

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they ever seek to obtain possession thereof until the commencement of this action in November, 1912.

Some contention is made by counsel for appellant that the evidence was not sufficient to support the findings of the trial court that there was no service of process in the tax foreclosure action and that respondent was in open and notorious possession of the property continuously since prior to the commencement of that action. We deem it sufficient to say that a careful review of the evidence convinces us that it was ample to call for the making of these findings.

The principal contention of counsel for appellant is that the tax deed has become conclusive against the claims of respondent, and that she has been thereby divested of all title to the property by virtue of the three-year statute of limitation against actions to set aside tax deeds. In view of the fact that the tax foreclosure judgment was rendered without jurisdiction, because of absolute failure of process in that action, it is plain that the tax deed does not result in divesting respondent of her title to the property unless the statute of limitation here invoked can be held to have rendered unavailable to respondent her defense rested upon want of jurisdiction of the court to render the tax foreclosure judgment. The statute invoked, being Rem. & Bal. Code, § 162 (P. C. 81 § 65), reads:

“Actions to set aside or cancel the deed of any county treasurer issued after and upon the sale of lands for general, state, county or municipal taxes, or for the recovery of lands sold for delinquent taxes, must be brought within three years from and after the date of the issuance of such treasurer’s deed.”

This statute has been the subject of consideration by this court, and given full force and effect, in the following cases, which are relied upon by counsel for appellant: *Cordiner v. Dear*, 55 Wash. 479, 104 Pac. 780; *Anderson v. Spokane, Portland & Seattle R. Co.*, 57 Wash. 439, 107 Pac. 183; *Huber v. Brown*, 57 Wash. 654, 107 Pac. 850; *Baylis v. Ker-*

rick, 64 Wash. 410, 116 Pac. 1082; *Fleming v. Stearns*, 66 Wash. 655, 120 Pac. 522. In each of these cases, the original owner of the land was the plaintiff seeking, in effect, to set aside a tax deed and recover the land held or claimed by the plaintiff under the tax deed. In each it was held that the cause of action there sought to be enforced was barred by this statute; but in none of them was it held, or even suggested, that this statute would bar the original owner, in possession at all times following the tax foreclosure, from defending his possession and title upon the ground of such foreclosure being void, when claim to the property is asserted by another under such foreclosure. In none of those cases was the effect of this statute upon the defense which the original owner in possession might make involved. Our attention has not been called to any decision of this court, and we think there has been none, where any such question has been considered. We have held that a void tax deed may constitute such color of title as to become a basis for the running of the statute of limitations (*Lara v. Sandell*, 52 Wash. 53, 100 Pac. 166); but not that such color of title, unaccompanied by possession, will, by mere lapse of time, divest the original owner of title to property he is in the actual possession and enjoyment of. This respondent did not commence this action "to set aside or cancel the tax deed," nor "for the recovery of" the property in question. She was already in possession of the property, and in the full enjoyment of all the rights in that regard which ownership and possession could possibly give her. Being in this situation, she had no occasion to do anything or take any steps looking to the protection of those rights until some one sought to invade them. All that she here seeks to invoke in the protection of her rights is by way of pure defense. If the language of this statute should be given the construction claimed for it by counsel for appellant, we are unable to see how it could be held to be a valid exercise of legislative power in the light of the due process of law provisions of the Federal and state

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constitutions. Judge Cooley in his work on Constitutional Limitations (7th ed.), at page 522, after noticing the legislative power to pass statutes of limitation, observes:

“All limitation laws, however, must proceed on the theory that the party, by lapse of time and omission on his part, has forfeited his right to assert his title in the law. Where they relate to property, it seems not to be essential that the adverse claimant should be in actual possession; but one who is himself in the legal enjoyment of his property cannot have his rights therein forfeited to another, for failure to bring suit against that other within a time specified to test the validity of a claim which the latter asserts, but takes no steps to enforce. It has consequently been held that a statute which, after a lapse of five years, makes a recorded deed purporting to be executed under a statutory power conclusive evidence of a good title, could not be valid as a limitation law against the original owner in possession of the land. Limitation laws cannot compel a resort to legal proceedings by one who is already in the complete enjoyment of all he claims.”

In *Groesbeck v. Seeley*, 13 Mich. 329, 342, Justice Campbell, speaking for the court touching statutes of limitation and legislative power to make them effective against persons already in possession, said:

“These laws do not purport to take away existing rights, although their operation may often have substantially that result. But they are designed to compel parties whose rights are unjustly withheld from them to vindicate their claims within some reasonable time. If a person who has been ousted of his possession or dominion desires to regain it, he knows that he must resort to those means which are furnished by the law, either by the peaceable act of a party himself, or by legal prosecution. A limitation law simply requires him to proceed and enforce these rights within some reasonable time, on pain of being deemed to have abandoned them. Such laws can only operate on those who are not already in the enjoyment and dominion of their rights. A person who has a lawful right, and is actually or constructively in possession, can never be required to take active steps against opposing claims. The law does not compel any man who is unassailed to pay any attention to unlawful pretenses which are not as-

serted by possession or suit. When such title is set up, he has a right to defend himself, by jury, if the claim is one of common law cognizance, or otherwise, if of a different nature. But to hold that, under any circumstances, a man can be deprived of a legal title without a hearing, is impossible, without destroying the entire foundations of constitutional protection to property. No one can be cut off by limitation until he has failed to prosecute the remedy limited; and no one can be compelled to prosecute, when he is already in possession of all that he demands."

In *Baker v. Kelley*, 11 Minn. 480, 495, Chief Justice Wilson, speaking for the court upon the same subject, said:

"It is not necessary for a party in the enjoyment of his rights to institute any proceedings against an adverse claimant, and to require him to do so would be, in many cases, imposing a grievous and expensive burden. A law requiring a party to take such action is not, nor has it any analogy to, a statute of limitation. Statutes of limitation only operate as an extinguishment of a remedy, and, of course, can have no application to a party who neither seeks nor needs a remedy."

In *Dingey v. Paxton*, 60 Miss. 1038, 1054, the court, speaking through Justice Cooper on the same subject, said:

"Before the entry of the defendant upon the lands, the plaintiffs, by their tenant, were in actual occupancy of all the land which was susceptible of cultivation, and were in the constructive possession of the whole tract. The sale of the lands for the unpaid taxes of 1874 was insufficient, under well settled principles, to divest their title. By a proceeding *in invitum* the state had attempted to acquire title under its laws as then existing and had failed. By a subsequent law it provides that notwithstanding such failure, the shadow of title thus acquired shall become the actual title unless attacked within a certain time. It is the expiration of time without regard to possession which is to transfer title from the owner and vest it in the state, or its vendee or donee. The power of the legislature to prescribe within what reasonable time one having a mere right of action shall proceed is unquestionable; but there is a wide distinction between that legislation which requires one having a mere right to sue, to

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pursue the right speedily, and that which creates the necessity for suit by converting an estate in possession into a mere right of action, and then limits the time in which the suit may be brought. The mere designation of such an act as an act of limitation does not make it such, for it is in its nature more than that. Its operation is first to divest from the owner the constructive possession of his property and to invest it in another, and in favor of the possession thus transferred to put in operation a statute of limitations for its ultimate and complete protection. A complete title to land, according to Blackstone, consists of *juris et sesinae conjunctio*; the possession, the right of possession and the right of property. One who is in the actual or constructive possession of his lands, and who has the right of possession and of property, needs no action to enforce his rights. He is already in the enjoyment of all that the law can give him and cannot be disturbed in such enjoyment except by 'due course of law.' "

It is of interest to note that, in these Minnesota and Mississippi cases, the actions were brought by the original owners who had evidently been in possession up to near the time of the bringing of their actions to recover against the holders of the tax deeds, who had acquired possession in some manner evidently against the will of the original owners. These holdings were, in effect, that the statute did not operate in favor of the holder of the tax deed while the original owner was in actual possession of the land. The Mississippi case apparently goes to the extent of holding that a void tax deed will not draw to its holder the constructive possession of the land, even if the land is unoccupied. The supreme court of Iowa in *Lewis v. Soule*, 52 Iowa 11, 2 N. W. 400; *Monk v. Corbin*, 58 Iowa 503, 12 N. W. 571, and cases there cited, holds that the statute of that state providing: "No action for the recovery of real property sold for the nonpayment of taxes shall lie unless the same be brought within five years after the treasurer's deed is executed and recorded," gives a void tax deed the effect of drawing the constructive possession of unoccupied lands to the holder of such deed, but leaves the inference, which is almost conclusively to be drawn

from the language of its decisions, that such constructive possession will not be drawn by the tax deed to its holder while the original owner is in actual possession of the land. The logic of all these decisions is that the statute will not run in favor of the holder of a tax deed while the land in question is in the actual possession of the original owner. This, of course, is in harmony with the view that he who is in possession and full enjoyment of his property is not required to protect his right to the property by instituting legal proceedings against another who merely claims such property but takes no steps to recover it.

Turning now to decisions involving the right of a person in possession of property, who is assailed by a suit in which the plaintiff rests his right upon an instrument other than a tax deed, we find the holdings of the courts equally conclusive in respondent's favor. In *Pinkham v. Pinkham*, 60 Neb. 600, 83 N. W. 837, where the defendant sought to defend his possession under a deed needing reformation, and by his answer sought to have it reformed, and the statute of limitations was invoked against such defense, Justice Holcomb, speaking for the court, said:

"It is urged that the statute of limitations operates as a barrier to prevent the appellee from reforming the instrument under which he claims by correction of the alleged error. There are, we think, two substantial reasons why this plea cannot be made available: first, the appellee is in possession of the land under claim of title to the property; his right and title is assailed by appellants. He may, in such a case, rightfully present any defense, legal or equitable, to sustain his title to the property, irrespective of the running of the statute. When his right of possession is attacked, a cause of action accrues, by which he may plead and prove any equitable defense of which he may be possessed. As long as his title is undisputed, and he is in the peaceable possession of the property thereunder, the statute of limitations would not run, so as to prevent him when sued from setting up any equity he has in defense of his possession."

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Responding to a petition for rehearing in this case, in 61 Neb. 336, 85 N. W. 285, Justice Sullivan, speaking for the court, used this vigorous expression:

"The right to commence and prosecute an action may be lost by delay, but the right to defend against a suit for the possession of property is never outlawed. The limitation law may, in a possessory action, deprive a suitor of his sword, but of his shield never."

In *Robinson v. Glass*, 94 Ind. 211, 216, Judge Elliott, speaking to the question of a defense invoked against a mortgage alleging fraud in its execution, said:

"In the argument on the assignment of cross errors, it is contended that, as the mortgage was executed more than six years before the suit was instituted and the defense of fraud interposed, the rights of the appellants are barred by the statute of limitations. This position is untenable. Actions are barred but defences are not. A person who is sued upon a contract may show that it was procured by fraud, although more than six years elapsed before the action on the contract was instituted and the defence interposed. We speak now of pure defences, and not as to matters which may be relied upon as forming a foundation for a counter-claim or cross complaint."

In *Mott v. Fiske*, 155 Ind. 597, 58 N. E. 1053, involving a defense made against a deed upon which the plaintiff rested his claim, the defendant asserting it to have been executed as a mortgage, Judge Monks, speaking for the court, said:

"Appellant nor any one under whom she claims title has ever occupied said land, nor is it shown that they ever attempted to enforce any rights thereto under the deed from Work before the commencement of this action. Under such circumstances whenever any attempt is made to enforce any rights under said deed, mere lapse of time will not bar the right to assert and show the same is a mortgage."

In *Muse, Syndic v. Yarborough*, 11 La. 521, 532, the court applied the maxim, "*quae temporalia sunt ad agendum perpetua sunt ad excipiendum*," as applicable to the defense made by the defendant in possession. The translation of this

maxim is given in 32 Cyc. 1279, as follows: "Things which afford a ground of action, if raised within a certain time, may be pleaded at any time, by way of exception." The applicability of this principle under our law will be more readily understood by noting the fact that in Louisiana the word "exception" is a comprehensive term referring to defenses. Garland, Revised Code of Practice, Louisiana (3d ed. 1910), § 330; *Gayoso De Lemos v. Garcia*, 1 Martin (La. N. S.) 324. The substance of the doctrine which we have been discussing is well summed up in the text of 25 Cyc. 1063, as follows: "Pure defenses are held not to be barred by the statute of limitations." Numerous authorities are there cited supporting and illustrating the applicability of this general rule.

Much of what we have said may seem more appropriate to the question of the constitutionality of statutes which assume to take away defenses which may be made by those in possession and enjoyment of their rights when assailed by others. But we think the authorities reviewed are equally applicable as showing that our legislature did not intend that the statute should ever be invoked to deprive one, in the possession and enjoyment of all he claims, from making any lawful defense he may have in the protection of such possession and enjoyment regardless of the question of time which may have elapsed following the initiation of the right under which his assailant claims. We do not hold that the statute is unconstitutional, but only that it has no application to the defense which this respondent here invokes, she being in possession and enjoyment of the property at all times since prior to the commencement of the void foreclosure proceeding.

The judgment is affirmed.

GOSE, MOUNT, and FULLERTON, JJ., concur.

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Opinion Per PARKER, J.

[No. 10952. Department One. August 4, 1913.]

NORTHERN PACIFIC RAILWAY COMPANY, *Plaintiff*, v. FIDELITY
AND DEPOSIT COMPANY OF MARYLAND, *Appellant*,
AND ELWOOD LUMBER AND TIMBER COMPANY
et al., Respondents.¹

BONDS—CONSTRUCTION—JOINT OR SEVERAL LIABILITY—SUBROGATION OF SURETY. Where an injunction bond was given by various lumber companies, as interveners in a suit in which a temporary injunction issued restraining the defendant railroad companies from putting into effect a schedule of increased freight rates, and the bond was conditioned that the interveners "shall severally repay to the defendants severally upon the several shipments" of the interveners, such increase in rates as may be adjudged to be lawfully chargeable, the bond does not create a joint liability for the increased freight found by the court to be lawful, but each shipper was severally liable only for the amount due on its own shipments; hence the subrogation of the surety on the bond under Rem. & Bal. Code, § 978, must be in severalty against the shippers found liable, especially in view of the fact that the several interveners were strangers to each other as far as business relations were concerned, and had no interest in common other than securing the injunction.

Appeal from a judgment of the superior court for King county, Tallman, J., entered July 24, 1912, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

William W. Wilshire, for appellant.

Farrell, Kane & Stratton, for respondent Elwood Lumber and Timber Company.

Paul Shaffrath, for respondent Sunset Shingle Company.

PARKER, J.—The Northern Pacific Railway Company brought this action in the superior court for King county, seeking recovery from the surety and principals upon a bond, executed and filed by them in the circuit court of the United

¹Reported in 134 Pac. 498.

States, a copy of which, so far as necessary for our present inquiry, is as follows:

"In the Circuit Court of the United States for the Western District of Washington Northern Division.—In Equity. Pacific Coast Lumber Manufacturers' Association, et al., Complainants, v. Northern Pacific Railway Company, et al., Defendants. No. 1565. Bond by Intervenor.

"Know All Men by These Presents

"That we, Active Lumber and Shingle Company, B. B. Shingle Company, F. H. Benedict, Clearbrook Lumber Company, Columbia Valley Shingle Company, Cline Lumber Company, Elwood Lumber and Timber Company, Evergreen State Lumber and Shingle Company, Hughey Shingle Company, Kendall Mill Company, H. T. Ross, Sunset Shingle Company, Triple B. Shingle Company and Washington Shingle Company as principals, and Fidelity and Deposit Company of Maryland as surety, are held and firmly bound unto the Northern Pacific Railway Company, Great Northern Railway Company, Chicago, Burlington & Quincy Railroad Company, Oregon Railroad & Navigation Company, Oregon Short Line Railroad Company, Union Pacific Railroad Company, Bellingham Bay & British Columbia Railroad Company, Columbia & Puget Sound Railroad Company, Port Townsend Southern Railroad Company and Canadian Pacific Railway Company, defendants in the above entitled cause, in the just and full sum of Ten Thousand 00-100 Dollars (\$10,000), for the payment of which well and truly to be made, we do hereby bind ourselves and each of our heirs, executors, administrators, successors and assigns, firmly by these presents.

"Sealed with our seals and dated this 9th day of March, 1908.

"The condition of the foregoing obligation is such that:

"Whereas the parties first above named in the foregoing obligation as complainants in intervention have commenced a certain suit in intervention in the above entitled cause and court against the above named parties defendant and have therein prayed for an injunction against the defendants pending the trial of said suit; and

"Whereas the Honorable Cornelius H. Hanford, one of the judges of said court, has granted said prayer for a provisional injunction upon condition that the said complainants

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in intervention will cause to be executed a good and sufficient bond to defendants in the sum of Ten Thousand and 00-100 Dollars (\$10,000), to secure them against all costs and damages which may be awarded to them in case said order shall be finally determined to have been improperly granted, and upon the further condition that the complainants in intervention shall severally repay to the defendants severally upon the several shipments of said complainants in intervention any difference in freight rates existing October 31, A. D., 1907, on lumber, shingles, and other forest products from points of origin in the state of Washington to points of destination in other states, and such increase in said rates as may hereafter be adjudged to be lawfully chargeable on and after the 1st day of November, A. D., 1907.

"Now therefore if the said complainants in intervention herein shall well and truly pay to the defendants all costs and damages which may be awarded to them in case the said court shall finally determine that the said order was improperly granted:

"And if they shall also severally well and truly pay to the defendants severally upon the several shipments of said complainants in intervention herein any difference in the freight rates existing October 31, A. D., 1907, on lumber, shingles and other forest products hereafter hauled by defendants or either of them from points of origin in the State of Washington to points of destination in other states, and such increase in said rates as may hereafter be adjudged to be lawfully chargeable on and after the first day of November, A. D., 1907, then this obligation shall be null and void otherwise to be and remain in full force and effect.

"Witness our hands and seals this 9th day of March, 1908.

ACTIVE LUMBER & SHINGLE Co.

By Austin E. Griffiths, Its Solicitor.

B. B. SHINGLE Co.

By Austin E. Griffiths, Its Solicitor.

F. H. BENEDICT

By Austin E. Griffiths, His Solicitor.

CLEARBROOK LUMBER Co.

By Austin E. Griffiths, Its Solicitor.

COLUMBIA VALLEY SHINGLE Co.

By Austin E. Griffiths, Its Solicitor.

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CLINE LUMBER Co.

By Austin E. Griffiths, Its Solicitor.

ELWOOD LUMBER & TIMBER Co.

By Austin E. Griffiths, Its Solicitor.

EVERGREEN STATE LUMBER & SHINGLE Co.

By Austin E. Griffiths, Its Solicitor.

HUEY SHINGLE Co.

By Austin E. Griffiths, Its Solicitor.

KENDALL MILL Co.

By Austin E. Griffiths, Its Solicitor.

H. T. Ross

By Austin E. Griffiths, His Solicitor.

SUNSET SHINGLE Co.

By Austin E. Griffiths, Its Solicitor.

TRIPLE B. SHINGLE Co.

By Austin E. Griffiths, Its Solicitor.

WASHINGTON SHINGLE Co.

By Austin E. Griffiths, Its Solicitor.

FIDELITY & DEPOSIT COMPANY OF

MARYLAND

By Walter S. McKay, Attorney in Fact.

Attest: by A. W. Whalley, Agent.

"The foregoing bond is hereby approved.

"Done and dated in open court this 9th day of March, 1908. C. H. HANFORD."

The plaintiff railway company alleged in its complaint that there was due it from certain of the defendants, principals upon the bond, respectively, certain sums on account of freight, aggregating \$3,653, claiming the same to be secured by the provisions of this bond, and demanding judgment for such aggregate sum jointly against the surety and all of the principals. The defendant Fidelity and Deposit Company, surety upon the bond, interposed no motion or pleading other than an answer to the merits, wherein it simply denied knowledge or information as to the unpaid freight due to the plaintiff from the principals and denied generally its indebtedness to the plaintiff upon the bond in any sum whatever.

A trial before the court without a jury resulted in find-

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ings and judgment in favor of the plaintiff against two of the principals in the sum of \$843.82 and \$726.22, respectively, and against Fidelity and Deposit Company, as surety, in the aggregate of those sums. It was further adjudged that upon payment of the judgment by the surety, Fidelity and Deposit Company, it be subrogated *pro tanto* to the rights of the plaintiff as against these two judgment debtors. The action was dismissed as to certain other principals named as defendants, evidently upon the ground that there were no sums due from either of them to the plaintiff on account of unpaid freight, and the court declined for that reason to render judgment against them upon the bond. Other portions of the judgment somewhat inconsistent with such dismissal, holding other defendant principals upon the bond jointly liable, we need not notice, since no appeal has been taken involving their rights. From this disposition of the cause, the Fidelity and Deposit Company has appealed.

While counsel for appellant has assigned numerous errors, the substance of his contention is that the trial court erred in declining to hold all of the principals jointly liable upon the bond for the payment of freight becoming due and unpaid from each and all of them to the plaintiff, and thus render them each and all jointly as well as severally liable to appellant under its rights of subrogation secured by Rem. & Bal. Code, § 978 (P. C. 81 § 1641), which provides:

“When any defendant surety in a judgment or special bail or replevin [bail], or surety in a delivery bond or replevin bond, or any person being surety in any bond whatever, has been or shall be compelled to pay any judgment, or any part thereof, or shall make any payment which is applied upon such judgment by reason of such suretyship, or when any sheriff or other officer or other surety upon his official bond shall be compelled to pay any judgment, or any part thereof, by reason of any default of such officer, except for failing to pay over money collected, or for wasting property levied upon, the judgment shall not be discharged by such payment, but shall remain in force for the use of the bail, surety, officer, or other person making such payment, and

after the plaintiff is paid, so much of the judgment as remains unsatisfied may be prosecuted to execution for his use."

So the problem for our solution is, Does this bond render the principals jointly as well as severally liable thereon, so far as the liability incurred by the last paragraph thereof relating to payment of freight is concerned, this being an action to recover upon that liability alone? It will be of some aid in arriving at a correct interpretation of the bond to note the circumstances under which it was executed. These, so far as necessary for us to further notice them, are undisputed and in substance as follows. Prior to October 31, 1907, the plaintiff and other carriers amenable to the Federal interstate commerce act, filed and published tariff rates substantially higher than the rates theretofore in force. On that day, the circuit court of the United States enjoined the collection from the Pacific Coast Lumber Manufacturers' Association amounts for the shipping of forest products scheduled in such tariff rates in excess of the rates shown in schedules of tariffs on file with the interstate commerce commission and in force up to that date. This injunction was issued at the suit of the Pacific Coast Lumber Manufacturers' Association and others, as complainants, and against this plaintiff and other carriers, as defendants.

Thereafter the principals upon this bond, by leave of court, intervened in that suit and prayed that the defendants therein be also enjoined from collecting such increased tariff rates from them. Thereupon a provisional injunction was issued as recited in the bond here sued upon, which bond was thereupon executed, and filed in that suit. Thereupon the plaintiff received and transported from the several interveners forest products in pursuance of the provisional injunction order, and collected compensation therefor according to the tariff rates in force up to October 31, 1907. Thereafter the interstate commerce commission fixed and determined rates chargeable for transportation of forest prod-

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ucts higher than the rates chargeable under the rates in force up to October 31, 1907, resulting in there becoming due to the plaintiff from certain of the interveners for unpaid freight after October 31, 1907, additional sums, including the sums for which judgment was rendered in this action. It is a fair inference to be drawn from the conceded facts of this case that the several interveners were strangers to each other, so far as their business relations are concerned, and had no interest in common other than the obtaining of the provisional injunction, and that their intervention in that suit was purely a matter of convenience and economy, and was permitted by the court to avoid numerous suits.

There has not been brought to our attention any decisions of the courts of any material aid to us in the interpretation of the language of this bond touching the question of the joint liability of the principals thereon. The question is conceded by counsel for all parties to be practically one of first impression. In the first part of the bond, the surety and principals "are held and firmly bound unto" the plaintiff and other carriers named, without any specific words of joint or several liability. The recitals in the bond, as to the nature of the order of the court in pursuance of which it was executed, are that the bond should be conditioned, so far as this liability is concerned, "that the complainants in intervention shall severally repay to the defendants severally upon the several shipments of said complainants in intervention any difference in freight rates . . . and such increase in said rates as may hereafter be adjudged to be lawfully chargeable on and after the 1st day of November, 1907." The condition actually inserted in the bond is, "if they shall also severally well and truly pay to the defendants severally upon the several shipments of said complainants in intervention herein any difference in the freight rates . . . then this obligation shall be void . . ." Looking carefully to all of the provisions of the bond, having in view the circumstances under which and the purpose for which it was given and the relation-

ship of the several principals thereon, we are of the opinion that it does not create a joint liability, in so far as the payment of freight is concerned, and that is the only liability here sued upon.

Counsel for the principals upon the bond call our attention to the following: *Hanna v. Savage*, 8 Wash. 432, 36 Pac. 269; *People v. Breyfogle*, 17 Cal. 504; *Boyd v. Keimle*, 46 Md. 294. Those cases, however, are of but little aid in our present inquiry, in view of the fact that it seems plain by the recitals of each bond involved therein that the obligors thereon were not rendered jointly liable. On the other hand, counsel for appellant invokes the former rule of strict construction in favor of sureties. This rule, however, has not only been repudiated in this state, but for the most part elsewhere when it comes to measuring the liability of paid sureties. *Cowles v. United States Fidelity & Guaranty Co.*, 32 Wash. 120, 72 Pac. 1032, 98 Am. St. 838; Frost, *Law of Guaranty Insurance* (2d ed.), § 4. So we must resort to the rules of construction applicable to other contracts. Viewed in this light, we are of the opinion that this bond does not create a joint liability, though it must be confessed the case here presented is by no means free from difficulty. It follows that the judgment must be affirmed.

It is so ordered.

MOUNT, CHADWICK, and GOSE, JJ., concur.

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Opinion Per CHADWICK, J.

[No. 11221. Department One. August 5, 1913.]

DAVIDSON FRUIT COMPANY, *Respondent*, v. PRODUCE
DISTRIBUTORS COMPANY, *Appellant*.¹

APPEAL—REVIEW—VERDICT. A verdict upon conflicting evidence will not be disturbed on appeal if there is some evidence to sustain it.

PLEADING—ANSWER—ARGUMENTATIVE DENIALS—BURDEN OF PROOF. In an action for a balance due on a shipment of strawberries sold to defendant, a so-called affirmative defense setting up that the defendant received them on consignment and sold them for plaintiff's account for the best price obtainable, adds nothing to defendant's general denial of a sale to him, and does not put upon defendant the burden of proving the consignment.

APPEAL—REVIEW—HARMLESS ERROR—INVITED ERROR. It is not error of which the defendant can complain that the trial judge treated his so-called affirmative defense as such and instructed the jury that the burden of proving the same was upon the defendant, although it contained no new matter and good pleading required only a denial; especially where the defendant treated it as an affirmative defense at the trial and requested an instruction which placed the burden of proving it upon him.

Appeal from a judgment of the superior court for King county, Tallman, J., entered December 21, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

James Kiefer, for appellant.

S. W. Stark and Farrell, Kane & Stratton, for respondent.

CHADWICK, J.—Plaintiff brought this action to recover a balance alleged to be due upon a shipment of strawberries. Plaintiff alleged a sale at a stipulated price. This is denied by the defendant. It sets up affirmatively that the berries were consigned to it as a produce broker, to be sold for the account of plaintiff; that it sold the berries on the market and has accounted for the proceeds thereof. From a verdict

¹Reported in 134 Pac. 510.

in favor of the plaintiff for the full amount alleged to be due, defendant has appealed.

It is first contended that the court erred in denying appellant's challenge to the evidence, and in denying the motion for a new trial because of the insufficiency of the evidence to sustain the verdict. The evidence is not as convincing as it might be, but there is a conflict and some evidence to sustain the verdict. In such cases, we have consistently refused to interfere with the judgment of the jury, or the discretion of the trial court.

The court fairly instructed the jury upon the plaintiff's theory of the case, saying:

"The burden of proof is upon the plaintiff to prove by a preponderance of the evidence all the material allegations which are alleged in the complaint and denied in the answer before the plaintiff can recover. And by the preponderance of the evidence is meant the greater weight of the evidence—not necessarily the testimony of the greatest number of witnesses, but the weight of the evidence which you have the right to believe and do believe to be true. . . . The material allegations which it is necessary for the plaintiff to prove in this case before it can recover are these: That the defendant agreed to pay \$3 per crate for these five hundred crates of strawberries. If you find from the evidence that the plaintiff has proved these material allegations by a fair preponderance of the evidence, it will be your duty to find for the plaintiff in this case. On the contrary, if you find the plaintiff has failed to prove these material allegations by a fair preponderance of the evidence it will be your duty to find for the defendant in this case."

Treating the issue tendered by the defendant, and which it had supported by competent testimony, the court said:

"The burden of proof is upon the defendant to prove the material allegations alleged in its affirmative defense before you can find for the defendant under the affirmative defense. And the material allegations which it is necessary for the defendant to prove before you find for it under the affirmative defense are these: That these strawberries were shipped to the defendant as produce brokers, sometimes known as

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commission merchants; that they were to sell the strawberries in the open market for the best price they could get under the circumstances and deduct therefrom \$109 for freight, and \$2 for cartage, and \$25 for brokerage commissions, and transmit the remainder to the plaintiff. If you find that the defendant has proven these material allegations by a fair preponderance of the evidence it will be your duty to find for the defendant under this affirmative defense. . . . I think I said that one of the material allegations which the defendant must prove under this affirmative defense before you find for it under the affirmative defense, was that these goods should be sold in the ordinary course of business and for the best prices obtainable under the circumstances—that is one of the material allegations which must be proved by the defendant before you find for it under the affirmative defense. . . .”

It will be seen that the only question for the jury was whether there was a sale. If there was, plaintiff was entitled to recover. If there was not, it could not recover. Defendant might have relied upon its general denial. That it did not, but pleaded affirmatively the facts as it understood them to be, took no burden from the plaintiff, nor did it add any to the defendant; it was still incumbent on plaintiff to sustain its case by a preponderance of the evidence. The general rule is that, if a defendant sets up new matter, he must assume the burden of proof. As for instance, if a plea of contributory negligence, or a want or failure of consideration is interposed, the burden of sustaining such defense usually falls on the one pleading them. This rule is based upon the theory that the cause of action is admitted, and the plea is tendered as one of confession and avoidance. No new matter is pleaded in the answer before us.

“What the code calls a ‘defence’ in pleading, and which we sometimes call an affirmative defence, can, by the express words of the code, consist only of new matter constituting a defence, *i. e.*, new matter which, assuming the complaint to be true, constitutes a defence to it; from which it is obvi-

ous that a denial or denials of the complaint can be no part of such defence." *Carter v. Eighth Ward Bank*, 33 Misc. Rep. 128, 67 N. Y. Supp. 300.

In setting up its version of the contract, defendant added nothing to its plea. A similar plea was made by way of an affirmative defense in *Peterson v. Seattle Traction Co.*, 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 53 L. R. A. 586. Exceptions being reserved to an order sustaining a demurrer to that part of the answer, this court held the demurrer to be well taken. Of the plea, the court said: "It added nothing to the denial already made. This defense cannot be construed as doing more than the denial." The rule is recognized and applied in *Williams v. Ninemire*, 23 Wash. 393, 63 Pac. 534; *Trumbull v. Jackman*, 9 Wash. 524, 37 Pac. 680; *Puget Sound Iron Co. v. Worthington*, 2 Wash. Ter. 472, 7 Pac. 882, 886.

We have said all this in the interest of good pleading, but it does not follow that the error is prejudicial. It has been frequently held that one will not be heard to object to an alleged error when invited by him, or to an erroneous instruction when given at his request. Appellant treated its denial as an affirmative defense, it so denominated it in its pleadings and tried its case upon that theory.

To hold, upon appeal, that the trial court should have detected appellant's error or oversight and instruct the jury upon the theory of denial, would be to relieve counsel of that duty which is forthcoming in every trial, and put a burden of precise, even technical, appreciation of the worth of pleadings upon the judge at the time the jury is instructed; whereas, it is his right to assume that the pleading offered by either party is drawn in conformity with established rules of practice and procedure. It was the duty of the judge to state the issues made by the pleadings. 38 Cyc. 1608. He was invited so to do, not by the pleadings alone, but by a request for an instruction in which appellant stated its

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principal defense and actually assumed the burden of the proof which it now seeks to reject.

“If the jury find from a fair preponderance of the evidence that the car of strawberries in suit herein was consigned by plaintiff to defendant to be sold by defendant for a fixed and agreed price, and further find by such preponderance of the evidence that upon the arrival of the car the plaintiff was notified of the condition of the fruit, the late arrival of the car, and the state of the market, and the plaintiff then authorized the defendant to dispose of the car for the account of the plaintiff, the plaintiff cannot recover and the jury should find for the defendant.”

Appellant cannot complain if the court put the burden where it would have been if its requested instruction had been given. Invited error is never held to be prejudicial. *Blashfield, Instructions to Juries*, § 39; *Elliott, Appellate Procedure*, §§ 625, 626, 627. In reviewing a case on appeal, courts have come to be more and more inclined to look to the effect of an alleged error rather than to the fact that an error was committed. In the instant case, the error was apparent rather than actual. There was but one issue. That is, whether there was a sale. The court said:

“So, you see, members of the jury, that the principles of law involved in this case are very few and very simple; the plaintiff's contention being that it sold these goods outright to the defendant for \$3 a crate; the defendant's contention being that the plaintiff did not sell the goods to them for \$3 a crate, but consigned the goods to the defendant for the defendant to sell as a commission broker and retain out of the amount received the charges which I have called your attention to. These are the two contentions in this case, and you will apply the law which I have given you as to the burden of proof in reference to those two contentions.”

In a legal sense, and in the light of the whole record, appellant was not prejudiced; for we are bound to presume, in the absence of any objection or suggestion of error at the time the jury was instructed, that the jury found that

respondent had sustained its cause of action by a fair preponderance of the evidence.

Affirmed.

GOSE, PARKER, and MOUNT, JJ., concur.

[No. 11265. *En Banc*. August 5, 1913.]

THE STATE OF WASHINGTON, *on the Relation of W. J. Langley et al., Plaintiff*, v. THE SUPERIOR COURT FOR SPOKANE COUNTY, *Respondent*.¹

APPEAL—DECISION—LAW OF CASE. The supreme court will not grant a writ of mandate to secure the vacation of orders requiring new parties to be brought in, and to compel the entry of judgment for plaintiff, sought on the ground that the orders deprive the plaintiff of substantial rights which cannot be reviewed on appeal, where plaintiff's application for a writ of certiorari to review the orders had been denied on the ground that there was an adequate remedy by appeal from the final judgment; since that decision became the law of the case.

MANDAMUS—WHEN LIES—REMEDY BY APPEAL. The writ of mandamus cannot be used to perform the office of an appeal to review judicial action.

MANDAMUS—APPLICATION—TIME TO SUE. An application for a writ of mandamus to secure the vacation of erroneous orders and the entry of a final judgment is not timely, and will be denied when not made until after the expiration of the time limited for taking an appeal from the orders.

Application filed in the supreme court May 8, 1913, for a writ of mandate to the superior court for King county, Huneke, J., to enter a judgment for plaintiff, and to vacate certain orders. Denied.

Cannon, Ferris & Swan and *Walter A. White*, for relators.
Post, Avery & Higgins, for respondent.

PER CURIAM.—This is an original application for a writ of mandate. The respondent has filed a demurrer and an-

¹Reported in 134 Pac. 173.

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swer conformably to the statute. Rem. & Bal. Code, §§ 1018, 1020 (P. C. 81 §§ 1763, 1767). The demurrer suggests that the application of the relator is neither timely nor meritorious. Prior to this application, the relators applied to this court for a writ of review. That application was denied. *State ex rel. Langley v. Superior Court*, 73 Wash. 110, 131 Pac. 482. Reference is made to the opinion in that case for the facts upon which the application was based, and for a fuller statement of facts than is here presented.

The facts essential to an understanding of the issues are briefly these. Prior to the 13th day of November, 1912, the principal case had been heard before the court upon the merits, and the court had filed an opinion favorable to the plaintiffs, relators here. On that day, the court entered an order requiring the plaintiffs to bring in additional parties. On the 4th day of December, in response to a motion of the plaintiffs, a second order was entered, modifying the order of November 13 in minor particulars, which in nowise affects the questions at issue. A writ of certiorari was sued out December 14 to review these orders. On April 18, 1913, an opinion was filed and the writ was denied. On the 1st day of May following, the plaintiffs applied to the court for a definite judgment in their favor upon the merits. The application was denied. On the 16th day of May, an application was made to this court for a peremptory writ of mandate, commanding the respondent to enter the judgment presented to him on the 1st day of May, and to vacate the orders entered on the 13th day of November, and the 4th day of December, to which reference has been made.

In considering the application for the writ of review, after reference to the proceedings in the case anterior to the application, we said:

“The applicants for the writ contend that they are erroneous and deprive them of substantial rights which cannot be reviewed by an appeal from the final judgment in the cause, and consequently they are entitled to review the same

in advance of such final judgment. But we cannot accept this view of the case. The orders differ in no respect from interlocutory orders generally; they are merely orders made during the progress of the cause deemed necessary by the court to a proper determination of the case. As such, they are not reviewable in this court in advance of the final judgment entered in the cause, but must be reviewed here, if reviewed at all, on an appeal or writ of review taken from the final judgment." Citing a long line of sustaining cases from this court. *Id.*, 73 Wash. 110, 131 Pac. 482.

The view there announced settled the law of the case. *Starr v. Aetna Life Ins. Co.*, 45 Wash. 128, 87 Pac. 1119. The basis of the majority opinion was that the relators had an adequate remedy by appeal. This, indeed, is the true test in all applications for extraordinary writs. *State ex rel. Korsstrom v. Superior Court*, 48 Wash. 671, 94 Pac. 472; *State ex rel. Carrau v. Superior Court*, 30 Wash. 700, 71 Pac. 648; *State ex rel. Egbert v. Blumberg*, 46 Wash. 270, 89 Pac. 708; *State ex rel. Gabe v. Main*, 66 Wash. 381, 119 Pac. 844; *State ex rel. Townsend Gas & Elec. Light Co. v. Superior Court*, 20 Wash. 502, 55 Pac. 933. The authorities are unanimous to the effect that neither a writ of mandate nor other extraordinary writ can be used to perform the office of an appeal to review the judicial action of an inferior tribunal.

The orders sought to be reviewed are those of November 13 and December 4, 1912. After the case had been heard below, and before the entry of these orders, the plaintiffs there, the relators here, had applied to the court for a definite judgment in their favor. This was refused. An application for a similar judgment was made on May 1, after the application for the writ of review had been denied. We feel constrained to hold that the application for a writ of mandate was not seasonably made. *State ex rel. Lowery v. Superior Court*, 41 Wash. 450, 83 Pac. 726; *State ex rel. Tumwater Power & Water Co. v. Superior Court*, 56 Wash. 287, 105 Pac. 815; *State ex rel. Alexander v. Superior*

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Court, 42 Wash. 684, 85 Pac. 673. These cases are to the effect that we will not ordinarily entertain jurisdiction of an application of this kind after the time fixed for taking an appeal has expired. In *State ex rel. Lowery v. Superior Court, supra*, the rule was relaxed because the relator was incompetent to manage her affairs, and in ill health. We adhered to the rule of limitation in the *Tumwater* case, where the relator, fourteen days after its appeal had been dismissed, applied to this court for a writ of review. In this respect, an application for a writ of mandate may not logically be distinguished from an application for a writ of review.

The demurrer is sustained, and the writ is denied.

[No. 11323. Department Two. August 5, 1913.]

THE STATE OF WASHINGTON, *on the Relation of Nettie Barnard, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Respondent*.¹

INFANTS — GUARDIAN AD LITEM — APPOINTMENT — CONTROL. The court appointing a guardian *ad litem* to prosecute a suit for a minor has plenary power to revoke the appointment and name a substitute, without any appellate or supervisory jurisdiction in the supreme court over the same.

REMOVAL OF CAUSES—EFFECT—GUARDIAN AD LITEM. After the removal of a cause from the state court to the Federal court, the latter becomes completely possessed of the action and has plenary power over the guardian *ad litem* of the plaintiff; and thereafter certiorari to review an earlier order of the state court in substituting a new guardian *ad litem* does not lie; the remedy, if any, being by application to the Federal court.

Certiorari to review a judgment of the superior court for King county, Humphries, J., entered June 12, 1913, revoking the appointment of a guardian *ad litem* for an infant plaintiff. Dismissed.

¹Reported in 134 Pac. 172.

Van C. Griffin and Reynolds, Ballinger & Hutson, for relator.

William M. Watson, for respondent.

FULLERTON, J.—On April 19, 1913, the superior court of King county appointed Nettie Barnard guardian *ad litem* of her minor son, Earl Adams, for the purpose of bringing an action to recover damages for injuries suffered by her son because, as she set forth in her petition, of certain wrongful acts of the Puget Sound Traction, Light & Power Company. Subsequently, on April 30, 1913, on motion of the attorney conducting the proceedings, and without notice to Mrs. Barnard, the court removed her as such guardian, and appointed one Robert D. Hamlin guardian *ad litem* in her place and stead; the reason set forth in the order being that Mrs. Barnard had failed, neglected and refused to verify a complaint in the action, or prosecute the same with diligence, or prosecute the same at all, and no sufficient reason appeared for her refusal. In this proceeding Mrs. Barnard seeks to review the order of removal, to revoke and annul the same, and to have herself reinstated as such guardian *ad litem*.

In response to the alternative writ issued by this court, the trial judge made a return showing, among other things, that, prior to the issuance of such writ, the guardian *ad litem* substituted for Mrs. Barnard had filed a complaint in the action in which he was appointed, and had caused the same to be served upon the Puget Sound Traction, Light & Power Company, and that the company had appeared in the action and had caused the same to be removed into the district court of the United States for the Western District of Washington, Northern Division, and that the action was then pending in that court. The guardian representing the plaintiff in the action below also appeared in this court, and moved to quash the writ on the ground that the same was issued improvidently and without any sufficient reason in law or in fact.

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It is our opinion that the motion should be granted. It is the consensus of the authorities that the court has plenary power over the person whom it appoints as guardian *ad litem* to prosecute or defend an action for an infant plaintiff or defendant who is not of the age at which he is permitted by statute to select his own guardian.

“It is the court’s duty to protect the infant fully, and to see that he is not prejudiced by any act or omission of the next friend or guardian *ad litem*. To this end the court may control the suit, and the next friend or guardian *ad litem* is at all times subject to the control and direction of the court. The court may, at its pleasure, revoke the authority of the next friend and substitute a new one, and it is the duty of the court to do so whenever the infant’s interests would otherwise be likely to suffer.” 14 Ency. Plead. & Prac., 1041.

“This power to make substitution is broad, and is necessarily exercised in a summary way; and there is no basis for the contention of the petitioner that it could not be done without notice to the next friend, or other formal proceedings.” *King v. McLean Asylum of Massachusetts General Hospital*, 64 Fed. 331, 354.

Such being the rule, it follows that the appellate court has no appellate or supervisory jurisdiction over such orders. *Estate of Hathaway*, 111 Cal. 270, 43 Pac. 754.

In this cause another reason exists for quashing the writ. The cause was removed to the district court of the United States prior to the time the alternative writ was sued out of this court. On the removal of the cause to that court, it became possessed of the same as fully and completely as if the action had been originally commenced therein. That court has the same plenary power over guardians *ad litem* as is possessed by courts generally. Clearly, therefore, neither this court, nor the superior court from which the cause was removed, can now make orders which will affect the parties to the action in that court. If the guardian *ad litem* representing the minor plaintiff is an unsuitable person, or was irregularly appointed, the court in which the action is now pending has ample power to make a substitution, and it would

seem that the remedy of the relator, if any she has for the wrong she conceives was committed, would be to apply to that court.

The writ is quashed and the proceedings dismissed.

MAIN, ELLIS, and MORRIS, JJ., concur.

[No. 11260. Department One. August 6, 1913.]

THE STATE OF WASHINGTON, *Respondent*, v. RILEY ROBEY,
Appellant.¹

INDICTMENT AND INFORMATION—DESIGNATION OF OFFENSE—GAMING. An information for "conducting a gambling game as owner," under a statute designating the party committing the crime as "a common gambler," is not demurrable as having improperly designated the crime, where it was otherwise sufficient.

GAMING—ELEMENTS OF OFFENSE — STATUTES — CONSTRUCTION. In an information for conducting a poker game as owner, under Rem. & Bal. Code, § 2469, defining a common gambler as every person who conducts as owner . . . any gambling game or game of chance played with cards . . . "or any scheme or device whereby any money is bet, wagered or hazarded upon any chance or any uncertain or contingent event," it is not necessary to expressly charge that money was bet; since (a) the quoted words do not apply to that part of the statute; and (b) were it otherwise, the charge of playing poker for money alleges a game of chance, and a hazarding upon an uncertain or contingent event.

Appeal from a judgment of the superior court for Whitman county, Miller, J., entered October 17, 1912, upon a trial and conviction of being a common gambler. Affirmed.

J. T. Brown, for appellant.

R. M. Burgunder and *Thomas Neill*, for respondent.

Gose, J.—The appellant was convicted of being a common gambler, and has appealed from the judgment entered upon the verdict of the jury. The information designates the

¹Reported in 134 Pac. 174.

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crime as "conducting a gambling game as owner," and charges that the appellant, in the county of Whitman, on the 24th day of August, 1912,

"Then and there being unlawfully, wilfully, and feloniously did then and there open, carry on and operate as owner thereof a gambling game commonly known as poker, the same having been played and operated with cards for checks, said checks then and there being representatives of value, to wit: representatives of money whereby money was then and there hazarded on said game, and said game was then and there so played in a certain room of a certain building known as 'Curley's Bar,' in the city of Tekoa, said county and state."

The statute upon which the information is based, Rem. & Bal. Code, § 2469 (P. C. 135 § 433), provides:

"Every person who shall open, conduct, carry on or operate, whether as owner, manager, agent, dealer, clerk, or employee, and whether for hire or not, any gambling game or games of chance, played with cards, dice, or any other device [or any scheme or device whereby any money or property or any representative of either, may be bet, wagered or hazarded upon any chance, or any uncertain or contingent event], shall be a common gambler. . . ."

We have inserted the brackets for convenient reference.

The appellant seasonably interposed a demurrer to the information on the ground that it does not state facts sufficient to constitute a crime; and after his motion for a new trial had been overruled, moved an arrest of judgment upon the same ground. The order overruling the demurrer and denying the motion in arrest of judgment constitutes the alleged errors.

It is argued that "conducting a gambling game as owner" is not made a crime by the statute, but that the statute designates the party committing the crime as "a common gambler." It suffices to say that a wrong designation of a crime in an information, if the information is otherwise sufficient, does not render it obnoxious to a demurrer. *State v. Nelson*, 39 Wash. 221, 81 Pac. 721.

The principal contention is that the facts set forth in the information do not constitute a crime. This argument is predicated upon the fact that the information does not expressly charge that money was bet, wagered or hazarded "upon any chance or any uncertain or contingent event." This was not necessary. The statute clearly divides itself into two parts. Correctly interpreted, it means, (a) that every person who conducts or operates the games mentioned in the section preceding the words set forth in brackets shall be a common gambler; and (b) that every person shall be a common gambler who conducts or operates any "scheme or device" forbidden in the language contained in brackets. We do not think the statute is susceptible of any other reasonable interpretation. If this were not true, the charge that the appellant as owner conducted a poker game played with cards for checks as representatives of value so clearly shows a game of chance, and a hazarding upon an uncertain or contingent event, that a demurrer would not lie; for playing poker for money is a game of chance. The words set forth in brackets were no doubt used out of abundant caution to cover unusual forms of gambling.

The judgment is affirmed.

PARKER, MOUNT, and CHADWICK, JJ., concur.

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Statement of Case.

[No. 10915. Department Two. August 6, 1913.]

ANNA DAVIES, *Appellant*, v. ROSE-MARSHALL COAL COMPANY,
Respondent.

CONRAD ARTHUR DAVIES, *by his Guardian Ad Litem etc.*,
Appellant, v. ROSE-MARSHALL COAL COMPANY,
Respondent.¹

APPEAL—RECORD—STATEMENT OF FACTS. An objection that the statement of facts, as certified, contained improper additions to the stenographic report of the evidence cannot be heard on appeal on mere exceptions to the order of the court allowing the same, the remedy being by mandamus to compel the judge to certify a proper statement.

TRIAL—PROVINCE OF COURT AND JURY—DIRECTING VERDICT. The court can withdraw the case from the jury and direct the judgment only where there is want of substantial evidence on some matter in issue material to be established, and not merely where a new trial could be ordered because against the weight of the evidence.

MASTER AND SERVANT—INJURY TO SERVANT—SAFE PLACE—WORKING PLACE IN COAL MINE—NEGLIGENCE—DEATH—CAUSE—EVIDENCE—SUFFICIENCY. There is sufficient evidence that the negligence of a coal mine owner caused the death of a miner, where it appears that his working place was not sufficiently supplied with air to dissipate carbon monoxide gas arising from the use of dynamite, that the presence of such gas was detected and a search made and the body of the deceased was found where it had fallen, upon his apparent hasty effort to escape from his working place, and characteristic symptoms on the body indicated to experts that he had met his death through poisoning from carbon monoxide gas.

Appeal from a judgment of the superior court for King county, Holcomb, J., entered June 27, 1912, in favor of the defendant, notwithstanding a verdict in favor of the plaintiffs, in an action for wrongful death. Reversed.

Brady & Rummens, for appellants.

John W. Roberts (*George D. Emory*, of counsel), for respondent.

¹Reported in 134 Pac. 180.

FULLERTON, J.—On December 30, 1910, one Thomas Davies met his death in a coal mine operated by the respondent, the Rose-Marshall Coal Company. Davies was at that time an employee of the respondent, engaged in the work of running a shaft along the vein of coal. The appellant Anna Davies is the widow of Thomas Davies, and the appellant Conrad Arthur Davies is his son. The appellants conceived that the death of Thomas Davies was the result of negligence on the part of the respondent, and brought separate actions against it to recover damages for his death. For the purposes of trial, these actions were consolidated by the court, and tried as one action. On the trial, at the conclusion of the evidence, the respondent interposed a challenge to its sufficiency. This challenge the trial judge held to be well taken; but at the solicitation of the appellants, and that a new trial might be avoided if the appellate court disagreed with his conclusion, consented to submit the question of fact to the jury; announcing at the same time that, if the jury returned a verdict for the appellants or either of them, he would, on motion of the respondent, set the verdict aside and enter a judgment in favor of the respondent. The cause was thereupon submitted to the jury, which returned a single verdict finding in favor of the appellant Anna Davies for the sum of ten thousand dollars, and in favor of the appellant Conrad Arthur Davies in the sum of five thousand dollars. On the return of the verdict, the respondent moved to set the same aside, and for judgment in its favor notwithstanding the verdict. This motion the court granted, the court dismissing the action with prejudice. This appeal followed.

Before passing to the principal question suggested by the record, it is well to notice an objection made by the respondent to the statement of facts as certified into this court. In presenting their proposed statement of facts, the appellants did not adopt, as correct in its entirety, the transcript of the evidence made by the stenographer who took down the proceedings, but supplemented the testimony of certain wit-

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nesses by making additions thereto. The respondent objected to these additions, when the statement of facts came on to be settled, contending and attempting to show by affidavits that the witnesses whose testimony was added to did not testify according to the proposed corrections. The court, however, allowed the corrections to stand, over the objections of the respondent, and certified them as a part of the proceedings. The respondent asks us to disregard these additions, and consider the record as though they formed no part thereof. But manifestly we are bound by the record as certified. If a trial judge does not settle and certify a proper statement, the remedy is by mandamus to compel him so to do; the party objecting cannot, by merely excepting to the ruling of the court allowing matters to stand in the record to which he objects, have the question reviewed in this court on the hearing of the appeal. *Warburton v. Ralph*, 9 Wash. 537, 38 Pac. 140; *Scott v. Bourn*, 13 Wash. 471, 43 Pac. 372; *State ex rel. Roberts v. Clifford*, 55 Wash. 440, 104 Pac. 631.

As indicated in the outline we have given of the case, the sole question presented by the appeal is the sufficiency of the evidence to justify the verdict. But before stating the evidence, it is well to recall that the action is one at law in which the appellants are entitled to the judgment of the jury on the weight and sufficiency of the evidence, and that the court is warranted in interfering with the verdict only in the case there is a want of substantial evidence on some matter in issue material to be established in order to justify a recovery. It is not enough that the evidence of the opposing side may seem to preponderate, or that the court may think it entitled to the greater credibility; these considerations may justify the trial court in granting a new trial before another jury, but they do not justify taking the case entirely from the jury and determining the questions in dispute as questions of law.

Turning to the record, it appears therefrom that the mine

in which Davies was working at the time he met his death was in the process of development, and had not yet reached the stage of a commercial mine. A shaft had been sunk on the coal vein, which has a slant of some sixty-five degrees, to a depth of perhaps 275 feet, and from the bottom of the shaft a tunnel called a gangway was driven along the vein of the coal for about 500 feet. Some thirty feet above the gangway, and parallel therewith, another tunnel was driven, called a counter. The counter constituted the chief air passage in the mine. Air forced into the mine from the fans above was turned into the counter and from thence distributed to the various working places in the mine, having its final exit along the gangway and up the main shaft. From the gangway, at distances apart of about sixty feet, chutes were driven upwards on the coal vein, and cross tunnels driven between them at varying distances, the object being to block out the coal that it might be more safely and expeditiously mined. These perpendicular chutes were numbered, commencing at the chute nearest the main shaft, from one to ten consecutively. Chutes six, seven and eight were driven perpendicularly on the coal vein for some sixty feet and for that distance had a slope of sixty-five degrees; from this point they were driven at an angle on the coal vein so as to form a slope of thirty-nine degrees. These chutes necessarily passed through the counter or principal air tunnel, and partitions containing doors were installed in the counter to arrest the air current and direct it to the working places.

Chutes nine and ten had been driven but a short distance above the counter when the accident to Davies happened. The operators of the mine were at this time working two shifts, the one began between 7 or 8 o'clock in the morning, and quit at 3:30 o'clock in the afternoon; the men usually stopping at 11:30 o'clock for some half or three-quarters of an hour for lunch. The second shift commenced when the first shift left off work. Davies, at the time he was killed, was working on the morning shift, and in chute eight. He went to

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work at the usual hour, and continued until about 11:30, when he lighted the blasts that he had previously loaded, and went down into the gangway for lunch. Other miners also came down at about the same time, and they ate their lunch together at a place in the gangway some distance towards the main shaft from Davies' working place. At this time, the force in the mine proper was not large. One man worked in chute seven immediately to the left of Davies, another in chute nine, immediately to his right; two others worked in a new working shaft which was being run from the gangway to the surface; two were engaged in hauling coal from the chutes to the hoist, and another in operating the hoist. Between 12 and 12:30 o'clock, all of the men went back to work, with the exception of Davies. He stayed and talked with the hoist tender concerning a hunting trip they were planning to take, and did not start back until about 2 o'clock. On his starting for his work, the hoist tender remarked to him the short time he had left in which to work, and was answered to the effect that he wished to trim up the chute before quitting time. This was the last time Davies was seen alive. The second shift came into the mine shortly after 3:30 o'clock. One Evans, who worked the second shift in chute eight, went up to the entrance of the chute, but did not go as far as the face on account of the condition of the air, finding evidence of the presence of carbon monoxide gas in such quantities as to lead him to believe it unsafe to remain. On his way back, he heard inquiries being made for Davies; and on being told that he was missing, turned and went back into the chute for the purpose of ascertaining if he was there. On entering the chute, he again detected the presence of carbon monoxide gas, but went back sufficiently far to see into the face of the chute, and into a crosscut that was started for the purpose of connecting with chute seven. The other men were then called, and after a man had been sent to the surface to make certain that Davies had not left the mine, a search was started for him, and his body found

at the bottom of chute eight next the gangway, he having apparently fallen head first down the chute.

There were scratches and contusions upon Davies' body, and his skull was fractured near its base. The miners, suspecting that he might have been overcome by gas, sought to resuscitate him, but without success. The body was taken to the surface and washed. The head, neck and shoulders were described by witnesses for the appellants as having a mottled appearance, the face and neck being cherry red. The blood, also, that escaped from the wound at the base of the skull was of the same bright red color, and did not coagulate for some considerable time after exposure to the air. The medical expert of the appellants testified that the cause of the death of Davies was poisoning from carbon monoxide gas. A miner whom the court allowed to qualify as an expert testified to the same effect. The respondent's experts, on cross-examination, in answer to hypothetical questions embodying the facts testified to by the appellants' witnesses as to the appearance of the body of the deceased, said that it presented the characteristic appearance of poisoning by carbon monoxide gas. Davies' pick was found lying on a small body of loose coal at the face of chute eight. Some portion of his wearing apparel (not named in the evidence, but said in the appellants' brief to have been his cap and lamp) were found about half way down the chute from his working place to the change in the angle of the chute.

Sometime prior to Davies' death, the respondent started to drive a new working shaft from the gangway to the surface; starting it at a point between the existing air shaft and Davies' working place. The workmen commenced in the gangway and drove two chutes, each about five and one-half feet square, to the surface. These chutes necessarily passed through the counter, and when opened at the top offered an escape for all the air forced into the mine, preventing it from circulating at the places where the mining was being carried on. To overcome this difficulty a device called an

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overcast was constructed at the junction of the chutes with the counter. This consisted of digging the counter wider at the point of junction, and dividing it by a partition so constructed as to leave an air passage along the counter and at the same time an opening through the chutes. The shaft was completed by digging out the coal between the chutes. To dig out this coal, work was begun at the top, the coal excavated being allowed to drop down the shafts into bins at the gangway, from whence it was carried to the hoist and brought to the surface. The work of excavation was carried on continuously, while the work of removing the coal excavated was carried on only a part of the time. At some time during the course of the work, and prior to Davies' death, the bottom of the overcast at the counter was broken by falling coal excavated from the pillar between the chutes. This allowed air to escape from the counter into the chutes whenever the coal accumulated in the chutes was lowered to a point below the bottom of the overcast. The chutes were emptied to a point below the counter on the day Davies met his death. A witness testified, also, that the trapdoor between chutes eight and nine was found open on the day of the accident, allowing such air as was then circulating in the mine to pass directly through the counter, instead of being forced into the Davies working place. Carbon monoxide gas is not a gas incident to this particular mine. It arises from the process of blasting with dynamite. The gas is lighter than air and hence collects in the upper part of the chutes, and is dissipated by forcing currents of air through it.

There was evidence in the record contradictory of much that we have recited, especially as to the appearance of Davies after death and the amount of air in his working place. Other circumstances, also, were shown which would indicate that Davies might have met his death from another cause than from poisoning by carbon monoxide gas. We think, nevertheless, that the court wrongfully withdrew the questions of fact from the jury. It is clear to our minds that there was

here abundant evidence to warrant the jury in finding that Davies came to his death by poisoning from carbon monoxide gas, and that it was the negligence of the respondent that he came into contact with it. It is the mine owner's statutory duty to provide in every coal mine a good and sufficient amount of ventilation for the employees therein, to be in no case less than one hundred cubic feet of air per minute for each person in the mine, and the air must be made to circulate through the shafts, levels, and working places of the mine, and on the traveling roads to and from such working places. To furnish the required amount of air and to make it circulate throughout the mine where men are working, is the nondelegable duty of the mine owner. The evidence to our minds justifies a finding to the effect that this duty was neglected in this instance. The evidence as to the immediate cause of death is more circumstantial, but we think equally sufficient. Summarized, it shows a cause for the collection of the poisonous gas, insufficient air to disseminate it, the entrance of Davies into the gas, his apparent hasty effort to escape from the place, and the presence on his dead body when found of the characteristic symptoms of poisoning by this particular gas. To allow the jury to determine from evidence of this character as to the cause of death is not to allow them to speculate, but is to allow them to determine ultimate from probative facts.

The respondent cites and relies on the following cases from this court: *Hansen v. Seattle Lum. Co.*, 31 Wash. 604, 72 Pac. 457; *Armstrong v. Cosmopolis*, 32 Wash. 110, 72 Pac. 1038; *Reidhead v. Skagit County*, 33 Wash. 174, 73 Pac. 1118; *Stratton v. Nichols Lum. Co.*, 39 Wash. 323, 81 Pac. 831, 109 Am. St. 881; *Stone v. Crewdson*, 44 Wash. 691, 87 Pac. 945; *Peterson v. Union Iron Works*, 48 Wash. 505, 93 Pac. 1077; *Olmstead v. Hastings Shingle Mfg. Co.*, 48 Wash. 657, 94 Pac. 474; *Whitehouse v. Bryant Lumber & Shingle Mill Co.*, 50 Wash. 563, 97 Pac. 751.

An examination of these cases will show, however, that in

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each of them the cause of the injury or death which was the subject of the inquiry was left wholly unexplained or undetermined. It is not so in the present case. Here there is substantial evidence touching each inquiry necessary to be established in order to warrant a recovery. The question what caused the death was, therefore, for the jury and not the trial court.

The judgment appealed from is reversed, and the cause remanded with instructions to overrule the motion for judgment notwithstanding the verdict, and to proceed according to the usual course of practice to a final determination of the case.

Crow, C. J., MAIN, and ELLIS, JJ., concur.

[No. 10979. *En Banc*. August 6, 1913.]

THE STATE OF WASHINGTON, *Respondent*, v. HEWITT LAND
COMPANY *et al.*, *Appellants*.¹

COLLEGES AND UNIVERSITIES — LANDS — DISPOSAL — POWERS OF REGENTS — STATUTES — IMPLIED REPEAL. LAWS 1862-63, p. 477, incorporating the board of regents of the university, in so far as it empowers the regents as a body corporate to hold and acquire real estate, is a mere definition of the powers of the board of regents, and is impliedly repealed by the whole course and tenor of subsequent repugnant legislation accomplishing a unified system of control of all public lands, whereby the state board of land commissioners is given full supervision and control and power of disposition of all public lands now or hereafter owned by the state and not appropriated by law to any specific public use (LAWS 1893, p. 387, § 5; LAWS, 1895, p. 527; LAWS 1897, p. 229; and Rem. & Bal. Code, §§ 4316-4330); especially in view of the fact that the later acts defined the duties of the board of regents with great particularity, without including the power to hold real estate; the regents being mere agents of the state with no vested rights in the subject-matter of their agency.

PUBLIC LANDS — UNIVERSITY LANDS — PRIVATE DEEDS TO STATE — POWER OF DISPOSAL — STATUTES — CONSTRUCTION. Lands deeded to the territorial board of regents of the university are "public lands"

¹Reported in 134 Pac. 474.

within the constitution and laws of the state, empowering the state board of land commissioners to dispose of the same; in view of the comprehensive acts of 1893, p. 387, authorizing the first land commission to dispose of all public lands granted to the state . . . for university and all other educational purposes not appropriated to any specific public use, and Laws 1895, p. 527, § 1, including therein all lands acquired by deed of sale or gift; and Laws 1895, p. 107, § 1, creating a university fund to be derived from the proceeds of all granted lands and all lands acquired by the university by purchase or donation.

COLLEGES AND UNIVERSITIES—LANDS—POWER OF DISPOSAL—STATUTES—CONSTRUCTION. No provision of law having conferred power on the territorial board of regents of the university to sell university lands, and that power being later conferred upon the state board of land commissioners, the fact that the state constitution provides for the confirmation of all lands "theretofore" sold by the university commissioners, and that the legislature passed such a confirmatory act (Laws 1890, p. 448), indicates the purpose and intent of the people and legislature to take from the regents all future power to dispose of university lands.

COLLEGES AND UNIVERSITIES—LANDS—DISPOSAL—"SPECIFIC PUBLIC USE"—STATUTES—CONSTRUCTION. Laws 1893, p. 387, § 5, conferring upon the state board of land commissioners the control and power to dispose of all public lands "not appropriated to any specific public use" means lands not occupied, employed or used by the state in the performance of some of its public functions; hence applies to unoccupied university lands, situated fifty miles from the site of the university and not necessary to the present uses of the university or the board in the performance of any of its functions.

PUBLIC LANDS—SALE—"GRANTED LANDS." Const., art. 16, § 4, providing that no more than 160 acres of any granted lands of the state shall be offered for sale in one parcel, has application to lands granted by the United States for public institutions, common schools etc., and not to private grants by individuals.

PUBLIC LANDS—SALE—DEED FROM STATE—VALIDITY—IRREGULARITIES. A state deed of more than 160 acres of university lands, sold in one parcel in violation of Laws 1897, p. 235, is an irregularity only and not void, as between the state and subsequent innocent purchasers for value, where there was no fraud and the law did not provide that such sale would be void, the limitation of the constitution against sales of more than 160 acres in one parcel applying only to lands acquired by Federal grant.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered November 18, 1912, upon findings

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in favor of the plaintiff, in an action to quiet title to and to recover possession of lands. Reversed.

E. R. York, T. W. Hammond, Gordon & Easterday, George T. Reid, J. W. Quick, and L. B. da Ponte, for appellants.

The Attorney General and R. E. Campbell, Assistant (H. G. Cosgrove, of counsel), for respondent.

Gose, J.—The italics in this opinion are our own, unless otherwise indicated.

On July 16, 1866, Thomas Chambers and wife deeded to the "Regents of the University of the Territory of Washington" a part of their donation land claim, 315 acres, situate in Pierce county, Washington. The deed was in form a common law deed of quitclaim, with habendum and tenendum to the regents "and to their successors in office and assigns." By an act of the territorial legislature, Laws 1862-63, page 477, a board of regents therein named was created "a body corporate and politic, with perpetual succession, under the name of the University of the Territory of Washington, by which they may sue and be sued." It was also provided that the government of the university should be vested in the board of regents, and that the regents "may hold all kinds of estate, real, personal, or mixed, which they may acquire by purchase, donation, devise, or otherwise, necessary to accomplish the object of the corporation." On March 4, 1903, the state land commission sold the land thus acquired upon the application of one Henry Bucey, and this action has been begun by the state to eject his successors and to quiet title.

The constitution, art. 16, § 1, provides that:

"All the public lands granted to the state are held in trust for all the people, and none of such lands, nor any estate or interest therein, shall ever be disposed of unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, be paid . . . ; nor shall any lands which the state holds by grant from the

United States . . . be disposed of except in the manner . . . prescribed in the grant . . .”

Section 2 of the same article refers to lands granted for educational purposes, and provides that all sales of school and university land theretofore made might be confirmed by the legislature. The first state legislature passed an act creating a state land commission and defined its duties. It was provided that “said commission shall have general supervision and control of *all public lands now owned by*, or the title to which may hereafter vest in the state, to be registered, leased and sold.” The commissioner of public lands was directed to abstract and survey all of the lands “*now owned by the state.*” Laws 1890, page 251. In 1893 the legislature passed “an act to provide for the creation of a state board of land commissioners for the management and *disposition of the public lands of the state,*” etc. Laws 1893, page 386. It is provided:

“That the said board of state land commissioners shall have full supervision and control, under the law, of all public lands granted to the State of Washington for common school, university and all other educational purposes; also including lands granted for charitable, reformatory and penal institutions, public buildings; and also all tide lands and harbor line areas, and *all other public lands that are now or shall hereafter be owned by the State of Washington*, so far as the same shall not have been disposed of, *and not appropriated by law to any specific public use.*” Laws 1893, p. 387, § 5.

State lands were classified in § 7: “(2) University lands and lieu and indemnity lands therefor; . . . (5) all other lands belonging to the state.” At the same session, Laws 1893, page 293, “An act providing for the location, construction and maintenance of the University of Washington,” was passed. The object of this act was to relocate the university. By it, the governor of the state was authorized and directed to buy certain land, the title “*to vest in the State of Washington* for the use of the University of Washington.” The duties of the regents of the university were defined, and

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they were empowered, "after the purchase of the lands by the governor," to sell ten acres in the city of Seattle known as the university grounds; the lands granted by the enabling act were assigned for the support of the University of Washington; a provision was made for the selection and sale of the lands "in the manner prescribed by law for selecting and selling other lands granted to the state." The board of regents were further directed to demand and receive from the board of university land and building commissioners all books, papers, records, and other property in their possession belonging to the University of Washington. There is nothing to indicate an intention on the part of the legislature to leave any real property to the disposition and control of the regents, other than the ten acres then appropriated to a specific use.

In 1895, Laws 1895, page 527, the law relating to the public lands of the state was rewritten. The classification so far as the university lands are concerned is the same as in the former act. Granted lands are defined as follows:

"(a) Common school lands and lieu and indemnity lands therefor. (b) University lands and lieu and indemnity lands therefor. (c) Other educational land grants. (d) Lands granted to the State of Washington for other than educational purposes, and lieu and indemnity lands therefor. (e) All other lands, including lands acquired or to be hereafter acquired by grant, deed of sale, or gift, or operation of law."

The board of state land commissioners is given "full supervision and control, under the law, of all public lands granted to the State of Washington as defined in section one of this act," and authority to manage, lease and dispose of the same. The legislature of 1897 again rewrote the public land law (Laws 1897, page 229). In so far as questions arising in this case are concerned, the act of 1897 does not differ from that of 1895.

Laws affecting the university and its government have been passed at several legislative sessions. The law as it now

is may be found in Rem. & Bal. Code, §§ 4316-4330 (P. C. 413 §§ 27-59). Section 4321 (P. C. 413 § 35), defines the powers and duties of the regents. There is nothing said in the seven subsections contained in § 4321 to indicate that the legislature had in mind the fact that the board of regents was now holding or had power to dispose of any land. This section was passed in 1909.

The concrete question presented by the record is whether, considering the course and tenor of our legislation, the land acquired by the board of regents in 1866 has become public land and as such subject to the control and disposition of the state land officials, or whether the board of regents still have title in virtue of their corporate being. It will be noticed that the act of 1893 makes the board of state land commissioners the successor of the state land commission, state school land commission, and the state board of equalization and appeal. The law provides that:

“From the date of its [the board of state land commissioners] assumption of official duties [it shall] possess and exercise over all such lands and areas all authority, power and functions, and shall perform all the duties which the state land commission, the state school land commission, etc., had and exercised.” Laws 1893, page 387, § 5.

The *Attorney General* argues that the authority of the present board of state land commissioners and of the state land commissioner can be and is no greater than was conferred upon the original officers and boards by the act of 1890.

Taking all the laws to which we have referred, and considering them as enactments directed toward the accomplishment of a certain thing—that is, a unified system of control of all public lands—we think the argument of counsel is not well founded. If the act of 1893 stood alone, there might be some merit in his contention.

The *Attorney General* insists that the act of 1862-63 is a special act, and that a special act will not be repealed by a

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general law "unless there is an irreconcilable repugnancy between them, or unless the new law is effectively intended to supersede all prior acts on the matter in hand and to comprise in itself a sole and complete system of legislation on that subject." *Callvert v. Winsor*, 26 Wash. 368, 67 Pac. 91. He also cites: *State v. Whitney*, 66 Wash. 473, 120 Pac. 116; *Tacoma Land Co. v. Pierce County*, 1 Wash. 482, 25 Pac. 904; *State ex rel. Arnold v. Mitchell*, 55 Wash. 513, 104 Pac. 791; 26 Am. & Eng. Ency. Law (2d ed.), 739-741; 86 Cyc. 1151; Lewis' Sutherland, Statutory Construction, §§ 268-274; Endlich, Interpretation of Statutes, 152; Black, Interpretation of Law, 116.

There can be no doubt as to the correctness of this rule, but it seems to us that there is a repugnancy between the act of 1862-63 and the later acts. It was evidently the purpose of the legislature to give the commissioner of public lands, an office created by the constitution (art. 3, § 1); and the board of state land commissioners, general supervision over all public lands. In evident recognition of the fact that such duties must of necessity be varied and manifold as well as changing from time to time, the duties of the commissioner of public lands were not defined in the constitution. It is there provided that: "The commissioner of public lands shall perform such duties and receive such compensation as the legislature may direct." Const., art. 3, § 23. The fact that the act of 1893, Laws 1893, page 293, put the duty upon the governor of receiving a deed to the new university site would further indicate that the legislature did not regard the board of regents as a corporate entity with power to take and hold lands. It must be remembered that no question of private right is involved. That provision of the Laws of 1862-63, page 477, giving to the board of regents the power to "hold all kinds of estate, real, personal or mixed, which they may acquire by purchase, donation, devise, or otherwise, necessary to accomplish the object of the corporation," was, in so far as the state is concerned, a definition of the powers of the

regent body. That body has no powers that are not conferred by statute, and none that the legislature cannot take away or ignore. The legislature having assumed, by various laws, a jurisdiction over all public lands, and having by later enactment defined the duties of the board of regents with great particularity, it would seem to be incontrovertible that the power to hold lands has been impliedly, if not directly, taken away from the board. The old act, although in form an act creating a corporation, is of no higher order than the subsequent acts limiting and defining the duties of the regents. None of the laws defining the power and duties of the regents create an inviolable right of contract. The board of regents are mere agents to do the will of the legislative body. An agent of the state has no vested right in the subject-matter of his agency. If the legislature grants to an officer certain powers, using general terms, and afterwards passes an act complete in itself specifically defining his duties, the first act should be held to be repealed by implication; for, as we have said, the question is one of state policy and not one of private right, and in so far as public officers are concerned "powers" and "duties" are interchangeable terms. This rule is especially applicable in this case, the legislature having by subsequent legislation given to the commissioner of public lands and the board of state land commissioners control over all state lands not appropriated to a specific public use.

But it is insisted that these lands, having come by deed to the corporate body—the board of regents—are not public or university lands within the meaning of the constitution and the several acts of the legislature.

The first land commission was authorized to dispose of:

" . . . all public lands granted to the state . . . for university and all other educational purposes; . . . and all other public lands . . . owned by the State of Washington, so far as the same shall not have been disposed of, *and not appropriated to any specific public use*; . . ."
Laws 1893, page 387.

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“(b) University lands . . . ; (c) other educational land grants; . . . (e) all other lands, including lands acquired . . . by . . . deed of sale, or gift, or operation of law.” Laws 1895, page 527, § 1.

A “University of Washington fund” was created in 1895. It is:

“ . . . the proceeds from the sales of lands granted to the state . . . for the university, and also the proceeds from the sales of *all lands acquired by the said university by purchase or donation.*” Laws 1895, page 107, § 1.

These statutes are comprehensive, and we must presume that, if the legislature had intended to exempt any particular tract, or any kind of land from its definitions of public lands and leave its disposition and control to the board of regents, it would have done so in terms. The method of acquiring title is not material. The terms of the grant or the use to which the land is put determines its character. In the definition of public lands the legislature has provided that the term shall include “all other lands, including lands acquired by . . . deed of sale, or gift, or operation of law.” The law provides for covering all moneys realized from the sale of public lands into the state treasury. If the lands in controversy are not public lands within the meaning of the statutes, and the board of regents still has power to hold lands, it can recover from the state all sums realized from the sale of lands heretofore deeded to the university. The statement of this conclusion carries its own refutation, for it is clearly in contravention of the plain policy of the law.

The further fact that the constitution provides for the confirmation of all lands *theretofore* sold by the university commissioners, and that the legislature passed a confirmatory act (Laws 1890, page 448) also indicates the intent, policy and purpose of the legislature, and of the people at the time the constitution was adopted, to take from the regents all *future* power to control or dispose of university lands. Rem. & Bal. Code, § 6637 (P. C. 477 § 369), provides that:

"Any person . . . to whom has been made a conveyance of . . . University land, which conveyance has been executed . . . by the . . . university commissioners of the said territory of Washington, or an authorized commissioner or regent of the university of said territory . . . shall have a right of action against the state of Washington . . . to secure a confirmation of title. . . ."

No provision is to be found in the law, or in any law, providing for a sale of university lands by the board of regents, whether granted, or acquired by purchase, donation or gift.

The state relies with confidence upon the case of *Callvert v. Winsor*, 26 Wash. 368, 67 Pac. 91. That part of the *Callvert* case which is relied on by the *Attorney General* is as follows:

"The term 'granted lands,' used in the commissioners' acts of 1893, 1895 and 1897, undoubtedly refers to lands granted by the United States for public institutions, common schools, etc., and not to *private grants by individuals*."

The text following this quotation clearly demonstrates that it was the intention of the court to hold that all public lands are subject to the control and disposition of the state land commissioner "so far," as is said in the opinion, and in the law, as "the same was not disposed of and not appropriated by law to any specific use." Laws of 1893, page 387, § 5. The act of March 14, 1893, construed in the *Callvert* case, dealt with lands then appropriated to a specific use. The words "appropriated by law for any specific public use" must be given a literal meaning. The general grant of power to the board of state land commissioners over "*all other public lands that are now or shall hereafter be owned by the state of Washington*" makes this construction imperative. Appropriated to a specific use means, therefore, devoted to a certain use; occupied, employed, or used by the state in the performance of some of its public functions. The terms "university lands," "capitol lands," are used to designate lands to be sold, and out of which the maintenance of

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the university, the erection of capitol buildings, and other like objects are to come. In the one case the money to be realized is to be devoted to a specific use. In the other it is the land; as for instance, the university campus, the capitol grounds, land devoted to experimental stations, fish hatcheries, etc. Manifestly such lands should not be made subject to lease or sale, and the legislature has so provided.

It is not contended that the land sought to be recovered by the state is devoted to a public or specific use. It is fifty miles away from the university, and, so far as the record shows, it is not necessary to the present uses of the university, or to the board of regents in the performance of any of its functions. The land under consideration in the *Callvert* case was a ten-acre tract in the city of Seattle that had been deeded to the state by Mr. Denny and others. The special act above referred to (Laws 1893, page 293), and construed in the *Callvert* case, referred *eo nomine* to a specific parcel of land then appropriated to a public use. This act antedated the first land commission act. The *Callvert* case must be construed in the light of this special act of the legislature. When so considered, the decision goes no further than to hold that, where a particular piece of land has been appropriated to a public use and the legislature has provided for its sale by a particular agent, the state land commissioner or the board of state land commissioners cannot sell it under the general laws. Reference to that case will show that one of the grounds upon which the decision was based was that the regents were directed to sell the land. It is elementary that it is within the power of the legislature to make the board of regents, or any other body, an agent to sell any part of its property, even to the exclusion of the commissioner of public lands. For his duties are to be "defined by law." Const., art. 3, § 23.

That the board of regents has long since ceased to be regarded by the legislature as a holder of state lands is further emphasized by our ruling in the case of *State v. Seattle*,

57 Wash. 602, 107 Pac. 827, 27 L. R. A. (N. S.) 1188. In that case the regents had attempted to appropriate a part of the old university grounds for street purposes. It was held that they could not. Now, if the board had been a corporate body, within the meaning of the act creating it, and holding the land as a corporate entity, no rule of law that we know of would have defeated the contentions of the city. The case was decided against the city because it was state or public land over which the regents had no control, except as they were directed by statute.

The briefs of counsel have taken a wide range, but being satisfied that the act of 1862-63, in so far as it put the power of holding or disposing of public lands in the board of regents, is repealed, it is unnecessary to pursue the discussion except to notice the contention of the *Attorney General* that the sale was made in violation of § 4, art. 16, of the state constitution, wherein it is provided that "no more than one hundred and sixty acres of any granted lands of the state shall be offered for sale in one parcel." If we sustain the state's contention in this respect, the deed is void. "No more than one hundred and sixty acres of any granted lands of the state shall be offered for sale in one parcel." Const., art. 16, § 4. Neither an officer of the state nor a board created by statute can violate the fundamental law. But we have said enough in the body of our opinion to demonstrate the fact that these lands and lands of like character are not referred to in the constitution.

"The term '*granted lands*,' . . . undoubtedly refers to lands granted by the United States for public institutions, common schools, etc., and not to private grants by individuals." *Callvert v. Winsor*, 26 Wash. 368, 67 Pac. 91.

The words "granted lands" have a definite if not a technical meaning. The term commonly implies, and when used without qualification is taken to mean, lands granted by the Federal government for a specific purpose. Lands acquired by purchase or gift are not such lands, unless they are so de-

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finer by statute. Deeded lands are not, as a rule, conveyed with any fixed purpose or with any limitation; whereas granted lands are given to the state because of an interest that the general government has in the object for which they are granted. They are held as a trust. Const., art. 16, § 1.

Power to sell *all lands* not devoted to a specific use is given to the land department of the state. The statute provides that "no more than one hundred and sixty acres of any school or granted lands shall be offered for sale in one parcel." Laws 1897, page 235. The law nowhere provides that such sales shall be void. As between the state and its vendee, it is possible that the sale of a tract or parcel containing a greater number of acres could be set aside; but here the property has passed into the hands of third parties, purchasers for value and in good faith. No fraud is alleged. There is a wide difference between power or jurisdiction and the irregular exercise of jurisdiction. "The test of jurisdiction is not right decision, but the right to enter upon the inquiry and to make some decision." *King v. McAndrews*, 111 Fed. 860. The constitution puts no limitation on the sale of any lands other than those included in the Federal grants. The legislature might have provided that lands other than the Federal grants should be sold in tracts or parcels of greater or less area. The officers of the state have exercised the power vested in them in an irregular way. In exercising their admitted power, they have ignored or overlooked the letter of the law; instead of offering the land in two tracts, they have offered and deeded it as one tract. As against the interest of those who have come into the possession and ownership of land so sold, a purchaser for value and without fraud on the part of any one, the state cannot be heard to question its conveyance. 32 Cyc. 1058.

Both sides rely upon the case of *Smelting Co. v. Kemp*, 104 U. S. 636, and there is language in that decision that can be quoted by both sides to this controversy, but in its final analysis the case must stand as an authority in favor of the appellants. The court there sustained a patent for 164

acres of mineral land, whereas the law was such that an entryman could acquire no more than 160 acres. The court held, there being nothing in the law to prevent an entryman from purchasing land entered by others and having it patented in the same instrument, that the patent was not void. The rule of that case is available to the appellants. A purchaser of land sold by the state or patented by the government has a right to presume that all proceedings leading up to the sale are regular. He is not bound to look beyond the face of the deed, either to find out whether the department has strictly complied with the law or rightly decided some fact, nor is he bound to investigate the conduct of the patentee or grantee. In other words, the patent or deed being in regular form, the law will not presume that it was obtained in fraud of the public right.

"The settled rule of law is that jurisdiction having attached in the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud." *Cornett v. Williams*, 20 Wall. 226.

"This principle is not merely an arbitrary rule of law established by the courts, but it is a doctrine which is founded upon reason and the soundest principles of public policy. 'It is one which has been adopted in the interest of the peace of society and the permanent security of titles.' *Belles v. Miller*, 10 Wash. 259, 38 Pac. 1050." *Kixer v. Caulfield*, 17 Wash. 417, 49 Pac. 1064.

See, also, *State v. Ort*, 66 Wash. 130, 119 Pac. 21. Unless fraud is shown, this rule is held to apply to deeds and patents executed by the public authorities. *King v. McAndrews*, *supra*; *Welsh v. Callvert*, 34 Wash. 250, 75 Pac. 871; *Boynton v. Haggard*, 120 Fed. 820; *United States v. Clark*, 138 Fed. 294; *Neff v. United States*, 165 Fed. 273; *United States v. Northern Pac. R. Co.*, 177 U. S. 435. The error and irregularity attending the sale puts the state in no better position than it would be if it had established the fraud of the original applicant. If it had done so, it would not

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defeat the title of these appellants. The principle is well stated in the case of *United States v. Clark*, 138 Fed. 294; *Id.*, 200 U. S. 601. We quote from the syllabus:

“While the United States is entitled to cancel fraudulent land entries as against the entryman and innocent purchasers prior to the issuance of a patent to the land, during which time the legal title remains in the government, after the entry is confirmed and title vested by the issuance of a patent, the government cannot repudiate the same and recover the land for such fraud, as against an innocent purchaser for value.”

In the body of the opinion it is said:

“When a government comes as a suitor into a court of equity, its claims appeal to the chancellor with no greater force than do those of an individual under like circumstances.”

In *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, it is said:

“We do not understand the law to be, . . . that one who enters into an ordinary and reasonable contract for the purchase of property from another is bound to presume that the vendor is a wrongdoer, and that, therefore, he must make a searching inquiry as to the validity of his claim to the property. The rule of law in respect to purchases of land or timber is the same as that which obtains in other commercial transactions, and such a rule as is claimed by counsel would shake the foundations of commercial business. No one is bound to assume that the party with whom he deals is a wrongdoer, and if he presents property, the title to which is apparently valid, and there are no circumstances disclosed which cast suspicion upon the title, he may rightfully deal with him, and paying him full value for the same, acquire the rights of a purchaser in good faith. *Jones v. Simpson*, 116 U. S. 609, 615. He is not bound to make a searching examination of all the account books of the vendor nor to hunt for something to cast a suspicion upon the integrity of the title.”

It is only where the department had no jurisdiction, or the lands sold were never public property, or had been previously disposed of, or no provision had been made for their sale, or

they had been reserved, that the deed would be inoperative and void. This being so, the appellants had a right to assume the integrity of the sale under the rule announced in *Smelting Co. v. Kemp, supra*. Patents or deeds from the state are held to be valid or invalid as the jurisdiction or want of jurisdiction to issue them appears on the face of the deed or patent, or when the instrument is read in the light of existing laws.

The cases of *State v. Ort*, 66 Wash. 130, 119 Pac. 21, and *State v. Heuston*, 56 Wash. 268, 105 Pac. 474, are relied upon by appellants. The *Attorney General* insists that these cases are not in point; that we there held no more than that the state was bound by a mistake of fact made by the duly constituted authorities. The *Ort* case strikes deeper than this. While all that is contended for these cases by the *Attorney General* was held in them, the land sold by the state to Ort was in fact timber land. It is said: "The evidence convinces us that each of the two quarter sections did have timber of commercial value thereon exceeding one million feet, and that, under the statute, the timber thereon should have been sold first and apart from the land; . . ." It was then decided that, inasmuch as the purchase price of the land had been paid and deeds had issued, the state must, if it did so at all, set aside the sale upon some equitable principle that would authorize an individual to set aside and declare for naught his executed contract. The constitution covering the sale of timber lands, § 3, art. 16, is quite as explicit as is the statute in this case. It is said: "No sale of timber lands shall be valid unless the full value of said lands is paid or secured to the state." The statute says "No more than one hundred and sixty acres of school or granted land shall be offered for sale in one parcel." Notwithstanding the finding of the court that the land was timber land, the sale was confirmed because the contract had been executed and no fraud had been shown. This holding is in keeping with the established doctrine that, in procedure and in the pursuit of methods, a citizen dealing

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with the state in good faith has a right to rely upon the integrity of its officers and upon the validity of its executed contracts.

In discussing this contention we have treated the lands in controversy as if they were school or granted lands within the technical definition of the terms. We have said enough in our opinion to indicate that there may be grave doubt whether the Chambers' tract ever was school or granted lands.

We conclude that the board of state land commissioners had power to dispose of the lands in controversy; that the sale does not come within the prohibition of the constitution; that the sale of a tract of 315 acres was an irregularity, and having passed into the hands of purchasers for value and in good faith, the state cannot recover.

The case is reversed, with instructions to dismiss.

CROW, C. J., MOUNT, PARKER, ELLIS, FULLERTON, MAIN, and CHADWICK, JJ., concur.

[No. 10994. Department One. August 7, 1913.]

THE STATE OF WASHINGTON, *on the Relation of T. H. Adams et al., Respondent*, v. C. S. IRWIN, *Mayor of the City of Vancouver, Appellant*.¹

MANDAMUS — PROCEEDINGS — PLEADING—JURISDICTION. A verified complaint with proper prayer for relief, is a sufficient compliance with Rem. & Bal. Code, § 1015, providing that the writ of mandamus must be issued upon "affidavit" on the application of the party beneficially interested, and confers jurisdiction to issue an alternative writ without issuance or service of a summons.

MUNICIPAL CORPORATIONS—POWERS—FUNDS—PURCHASE OF LANDS—PAYMENT. Under Rem. & Bal. Code, § 7685, providing that a city of the third class shall have power to purchase land for a cemetery, and to levy a tax from the general fund not exceeding sixty cents on each one hundred dollars, the purchase price of a cemetery be-

¹Reported in 134 Pac. 484; 135 Pac. 472.

comes a charge upon the general fund, in the absence of any special provision calling for payment from some other fund.

SAME—INDEBTEDNESS—LIMITATIONS. Lack of money in the general fund to meet a liability, is not a valid objection to incurring the liability, when the constitutional limit of indebtedness is not exceeded.

Appeal from a judgment of the superior court for Clarke county, McKenney, J., entered July 30, 1912, upon findings in favor of the plaintiff, in mandamus proceedings, after a trial to the court. Affirmed.

Miller, Crass & Wilkinson, for appellant.

McMaster, Hall & Drowley, for respondent.

PARKER, J.—This is a mandamus proceeding, wherein the relators seek to compel the mayor of the city of Vancouver to issue a warrant upon the general fund of that city, in payment of the purchase price of land sold by them to the city for cemetery purposes. Judgment was rendered in favor of the relators, from which the defendant has appealed.

On May 3, 1911, the city, through its council, purchased the land here involved from its then owners for the sum of \$10,347, when a warrant was issued to them in payment of the purchase price and conveyance of the land made to the city. This warrant was sold by the owners to the Vancouver National Bank. Soon thereafter, a taxpayer of the city commenced an action in the superior court for Clarke county, seeking to have payment of the warrant enjoined upon the ground that the purchase of the land by the city was illegal and void, in that one of its councilmen was at the time a part owner of the land and received his due proportion of the purchase price thereof. Thereafter negotiations were entered into between the bank and the city looking to a settlement of the controversy, which resulted in the bank surrendering the warrant to the city and the city conveying the land to the relator T. H. Adams, the then president of the bank. A few days thereafter, the city council met and caused adver-

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tisement to be made inviting proposals to sell to the city land for cemetery purposes. In response to this action of the city, there was received by it, among other proposals, one from the relator T. H. Adams, offering to sell to the city this same land for the sum of \$10,847 with interest added thereto to be computed from the 10th day of May, 1911, which we assume was the day on which the bank purchased the warrant which it thereafter surrendered to the city. The council thereupon, on April 1, 1912, voted to accept this proposal and ordered the issuance of a warrant by the mayor and city clerk in payment of the purchase price which, upon computation of interest, was found to be \$10,900.56. On the following day, April 2, 1912, the city clerk duly prepared a warrant drawn upon the general fund of the city for that sum, which warrant was presented to the mayor for his signature, when he refused to sign the same. This proceeding followed, resulting in judgment against appellant requiring him to sign and issue such warrant, when he appealed from such judgment, as we have above stated.

It is first contended by counsel for appellant that the court erred in denying his motion to quash the alternative writ of mandate, made upon the ground that the proceeding was not commenced by affidavit nor by complaint and summons. The allegations of the relators' cause of action were made in the form of a verified complaint, which was so designated in the caption thereof, instead of in the form of an affidavit. It was upon this verified complaint that the alternative writ of mandate was issued and served; there being no summons issued. Counsel concede that mandamus proceedings may, under our law, be instituted by the filing of a statement of relators' cause of action in either of these forms. *Smith v. Ormsby*, 20 Wash. 396, 55 Pac. 570, 72 Am. St. 110; *State ex rel. Cicoria v. Corgiat*, 50 Wash. 95, 96 Pac. 689. They insist, however, that, when the relators' cause of action is stated in the form of a complaint, the issuance and service of a summons upon the defendant is necessary to en-

able the court to acquire jurisdiction, and that it is only when the relators' cause of action is stated in the form of an affidavit that the court can acquire jurisdiction by the issuance and service upon the defendant of an alternative writ of mandate; and that, therefore, there was no authority for the issuance and service of such a writ as the original process in this proceeding.

It is true that Rem. & Bal. Code, § 1015 (P. C. 81 § 1757), relating to the issuance of such a writ provides, "It must be issued upon affidavit on the application of the party beneficially interested." While the word affidavit in its narrow and technical sense may be regarded as less comprehensive than complaint, it seems to us that the word as here used is a mere designation of the plaintiffs' or relators' first pleading in which he is to state his cause of action, and that when he has stated his cause of action, either in the form of a verified complaint or of an affidavit, such a statement, with proper prayer for relief, is sufficient to authorize the court to proceed to acquire jurisdiction by the issuance and service of an alternative writ of mandate. We conclude that the appellant's motion to quash the writ was properly denied by the trial court.

Some contention is made against the power of the city council to incur obligation by the city to pay the purchase price of the land to be used for cemetery purposes. Vancouver is a city of the third class. Referring to Rem. & Bal. Code, § 7685 (P. C. 77 § 323), relating to the powers of the councils of such cities, we read:

"The city council of such city shall have power. (2) . . . To purchase and plat land for the purpose of cemeteries and to provide by ordinance for the regulation thereof. . . . (9) To levy and collect annually a property tax, which shall be apportioned as follows: For the general fund, not exceeding sixty cents on each one hundred dollars; for street fund, not exceeding thirty cents on each one hundred dollars, and for sewer fund, not exceeding ten cents on each one hundred dollars. The levy for all purposes for any

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one year shall not exceed one dollar on each one hundred dollars of the assessed value of all real and personal property within such city."

This latter subdivision, counsel insists, is the only tax-levying power the city council possesses, and they urge that there is not found therein any authority to raise revenue for the purchase of land for cemeteries. It seems to us it must be regarded as elementary law that when a municipality is given power to purchase property for some specific purpose, as such power is clearly given to Vancouver by subdivision 2 above quoted, it necessarily follows that the purchase price of such property becomes a charge upon the general fund of such city, in the absence of some special provision calling for payment from some other fund. Manifestly, all lawful obligations of a municipality are payable from its general fund, unless the law specifically provides otherwise. We are of the opinion that the purchase price of this land is payable out of the general fund of the city.

Some contention is rested upon the alleged want of showing that there is money in the general fund of the city available for the payment of the warrant sought to be issued. This, it is claimed, is manifest by the failure of proper allegations in the complaint and also by failure of proof on the hearing. It is not claimed or even suggested that the incurring of this indebtedness would exceed the 1½ per cent debt limit imposed upon municipalities by § 6, art. 8 of the constitution which may be incurred by their proper constituted authorities without a vote of the people. This being the case, we are wholly at a loss to understand how the fact that there may not be at present in the general fund of the city sufficient money to pay such warrant can have any bearing upon the question of the legality of its issuance. Our attention has not been called to any provision of law that prohibits the issuance of warrants upon the general fund of the city for a lawfully incurred obligation thereof because of the want of money in such fund to pay for such warrant, nor do we know

of any such restriction; and since it is not claimed that the constitutional debt limit will be exceeded by the issuance of this warrant, it seems clear to us that this contention is wholly without foundation.

It is finally contended by counsel for appellant that the evidence introduced upon the trial calls for the conclusion that the purchase of this land from the relators is, in substance, only an attempt to cure the illegality of the first sale; and that the councilman who was interested in the land at the first sale is also in fact interested in this sale, he still being a member of the council, which renders this sale illegal in the light of Rem. & Bal. Code, § 7702 (P. C. 77 § 363), and our decision in *Gantenbein v. Pasco*, 71 Wash. 635, 129 Pac. 374, 131 Pac. 461. The trial court found against appellant upon this question, and a careful review of those portions of the evidence to which our attention has been called convinces us that there is no ground for disturbing such finding. We agree with the trial court that appellant failed to show that any of the councilmen had any pecuniary interest whatever in the bringing about of this second sale. We conclude that the relators are entitled to a warrant upon the general fund of the city in the sum of \$10,500.56 as of the date of the judgment rendered against the appellant, to wit, July 30, 1912, and that the judgment should be affirmed. It is so ordered.

We find among the exhibits brought here with the statement of facts a deed of conveyance for this land duly executed by the relators to the city, being plaintiffs' exhibit 8. This, we understand, is the deed which was tendered to the city by the relators at the time of demanding their warrant on April 2, 1912. The clerk of this court is directed to return this deed to the clerk of the superior court for delivery to the city upon the issuance of the warrant in compliance with the judgment.

GOSE, MOUNT, and CHADWICK, JJ., concur.

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Opinion Per Curiam.

ON PETITION FOR REHEARING.

[*En Banc*. October 9, 1913.]

PER CURIAM.—Counsel for respondents, in a petition for rehearing, call our attention to what are manifestly clerical errors in our statement of the amount of the warrant respondents are entitled to, and also the date as of which they are entitled to such warrant. In our opinion filed on August 7, 1913, we said:

“We conclude that the relators are entitled to a warrant upon the general fund of the city in the sum of \$10,500.56 as of the date of the judgment rendered against the appellant, to wit, July 30, 1912, and that the judgment should be affirmed.”

A reference to the judgment of the learned trial court, which we have affirmed, will readily show that neither this statement of the amount or date is correct. The language above quoted from the opinion may therefore be considered as stricken therefrom, and in lieu thereof we will simply state that the judgment is affirmed. The judgment, upon its face, specifies the amount of the warrant respondents are entitled to, and also shows the date, when taken in connection with the record, as of which respondents are entitled to such warrant.

Respondents' petition for rehearing does not need further notice, and in view of the fact that the questions we are now disposing of relate only to these clerical errors, we deem it unnecessary to grant a rehearing.

[No. 11177. Department One. August 7, 1913.]

UNITED STATES FIDELITY & GUARANTY COMPANY,
Respondent, v. ZOPHAR HOWELL 3rd, *Guardian*
of Harriet A. Ervay, Incompetent,
*Appellant.*¹

INSANE PERSONS—ACTIONS—SERVICE OF PROCESS—GUARDIANS—JURISDICTION. Under Rem. & Bal. Code, § 1670, providing that in actions against an incompetent person, process shall be served upon his guardian, and any judgment against the ward or guardian shall be satisfied from the property of the ward only, service of summons on the guardian as such confers jurisdiction to enter judgment against the estate of the ward.

SAME—ACTIONS—PLEADINGS—TITLE. Under said section, an action against an incompetent may be brought in form, and entitled in the caption, against the guardian as such.

INDEMNITY—PAYMENT OF FOREIGN JUDGMENT—PRESUMPTIONS. In an action on a contract to indemnify the surety in a replevin bond, the fact that the surety diligently defended an action in a foreign court having jurisdiction, brought on the replevin bond for damages resulting from the detention of the property, and was compelled to satisfy the judgment therein, establishes *prima facie* that the surety suffered damages by reason of becoming a surety on the bond; and it is not essential that such damages be recovered in the replevin action.

SAME—CONTRACT—CONSTRUCTION. An agreement to reimburse a surety in a replevin bond for any damages suffered by it in becoming a surety, contemplates damages recovered against the surety in an action on the bond for detention of the property.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered January 10, 1913, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

S. J. White, for appellant.

McClure & McClure and *Walter S. Osborn*, for respondent.

¹Reported in 134 Pac. 490.

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Opinion Per PARKER, J.

PARKER, J.—This is an action upon a contract of indemnity, entered into between the plaintiff and Harriet A. Ervay, while she was competent to manage her own affairs, wherein she agreed to reimburse the plaintiff for any damages suffered by it in consequence of it becoming surety upon a replevin bond for her. A trial before the court without a jury resulted in findings and judgment in favor of the plaintiff, from which the defendant has appealed.

The controlling facts are not in dispute, and may be summarized as follows: In January, 1910, Harriet A. Ervay, being then of sound mind, instituted an action in the county court of Vancouver, province of British Columbia, against one Spence, to recover the possession of an automobile. In order to obtain possession of the automobile during the pendency of the action, it was necessary for her to execute, with a surety, a replevin bond in the sum of \$1,800. She then applied to appellant to become her surety upon such bond, which it executed as surety, and she thereby obtained possession of the automobile. Such proceedings were thereafter had in that action that it was dismissed, and the return of the automobile to the defendant Spence adjudged. Thereupon the automobile was accordingly returned, and the costs of that action adjudged against Harriet A. Ervay were paid. The question of damages resulting to Spence from the seizure and detention of the automobile pending that action was not adjudicated therein. The replevin bond was conditioned for the payment of such damages, as well as for the return of the automobile to Spence in the event it should be so finally adjudged.

Prior to the execution of the replevin bond, Harriet A. Ervay agreed, in writing, to reimburse respondent for any and all damages and expenses of whatsoever kind that it should at any time sustain or incur in consequence of it having become surety upon the replevin bond. Thereafter, in September, 1910, Spence commenced an action in the county court of Vancouver, against Harriet A. Ervay and respond-

ent as her surety upon the replevin bond, to recover damages resulting from the seizure and detention of the automobile pending the replevin action. No jurisdiction was obtained in this damage action over Harriet A. Ervay, because she was not then in British Columbia. Jurisdiction was obtained, however, over respondent. Thereafter, in March, 1911, judgment was rendered in that action against respondent for the sum of \$689 and costs. Respondent diligently and skilfully defended that action. Thereupon respondent was compelled to pay, and did pay, that judgment. Prior to the commencement of that action, Harriet A. Ervay had been adjudged incompetent to manage her own affairs, and James Brady was duly appointed guardian of her person and estate by the superior court for Snohomish county. Upon the commencement of that action in the county court of Vancouver, respondent made diligent effort to notify the guardian of the pendency thereof, and succeeded in so notifying him, about one month before the rendering of the judgment against respondent therein. Thereafter respondent presented its claim to the guardian, demanding reimbursement for the amount so paid by it in satisfaction of the judgment rendered against it, which being refused, this action followed, resulting in judgment in its favor as above stated. Thomas Brady died in April, 1912, and thereafter Zophar Howell, 3rd, was duly appointed as guardian in his stead by the superior court for Snohomish county, and substituted as defendant in this action. The county court of Vancouver is a court of record, and possessed of jurisdiction in actions at law where the amount involved does not exceed \$1,000.

It is contended by counsel for appellant that the trial court did not acquire jurisdiction in this case, because Harriet A. Ervay was not personally served with summons and was not properly named as a party defendant. It is conceded that her guardian was duly served with summons. Assuming, for the moment, that the parties to this action were properly named, Was the service of the summons upon the

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guardian sufficient to give the court jurisdiction to render judgment against the guardian as such, binding upon the estate of Harriet A. Ervay, the ward, that being, in substance, the form in which the judgment was rendered?

Section 1670 of Rem. & Bal. Code (P. C. 409 § 779), relating to actions against incompetent persons and their guardians as such, provides:

“No such ward shall be held to bail, or his body be taken in execution, in any civil action; and in all actions commenced against him the process shall be served upon his guardian, and in all judgments against such ward (or his guardian as such) the execution shall be against the property of the ward only, and in no case against his body, nor against that of his guardian, nor the property of said guardian, unless he shall have rendered himself liable thereunto.”

This provision, we think, renders it plain that service upon the guardian is proper and sufficient service to give the court jurisdiction, and that no other or different service is required where judgment is sought and obtained as in this action.

Was it necessary to designate in the caption or title of the case Harriet A. Ervay as a defendant, or was it sufficient to designate her guardian as such, as the defendant? as was here done in the summons and complaint. We think this question must be answered in respondent's favor, in view of the provisions of § 1670 above quoted, for manifestly that section contemplates the action being prosecuted either in name against the ward, or against the guardian as such, and the rendition of judgment in an action prosecuted in either of these forms renders the judgment binding upon the estate of the ward to be satisfied therefrom. We are of the opinion that the court was not wanting in jurisdiction because of the action being brought in form against the guardian as such instead of against the ward by name.

It is further contended in behalf of appellant that neither Harriet A. Ervay nor respondent as her surety were liable upon the replevin bond for damages resulting from the detention of the automobile pending the replevin action in the

Vancouver court, since such damages were not adjudicated in that replevin action. This is but little else than a contention that the judgment in the action for damages in the Vancouver county court was erroneously rendered against respondent. Counsel's contention proceeds upon the theory that such damages must be adjudicated in the replevin action only, and invokes the presumption that the law of British Columbia upon that subject is the same as the law of this state. The answer to this contention is found in the fact that it is here established beyond controversy that the county court of Vancouver is a court having jurisdiction to render that judgment, and that respondent was compelled to satisfy the same; and further that respondent diligently and skilfully defended that action. This constituted, at least, a *prima facie* showing of the damage respondent suffered by reason of becoming surety upon the replevin bond. No proof whatever was offered in this action to overcome such *prima facie* showing.

We are clearly of the opinion that the damages which were sustained by respondent by being compelled to pay the judgment rendered by the county court of Vancouver were such as were contemplated by the indemnity agreement entered into between respondent and Harriet A. Ervay in compliance of which it became surety upon her replevin bond.

The judgment is affirmed.

MOUNT, GOSE, and CHADWICK, JJ., concur.

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Opinion Per MOUNT, J.

[No. 11404. Department One. August 7, 1913.]

THE STATE OF WASHINGTON, *on the Relation of Frank I.*
Sefrit, Plaintiff, v. THE SUPERIOR COURT FOR
WHATCOM COUNTY *et al., Respondents*.¹

CERTIORARI—WHEN LIES—ADEQUACY OF REMEDY BY APPEAL. The remedy by appeal from an order refusing to extend the time within which to file a statement of facts in a case pending on appeal, is inadequate and hence certiorari lies; since the appeal could not be heard until after the time for filing a statement of facts had expired under Rem. & Bal. Code, § 393, fixing the utmost limit at ninety days after the date of final judgment.

APPEAL — RECORD — STATEMENT OF FACTS — EXTENSION OF TIME—ABUSE OF DISCRETION. It is an abuse of discretion to refuse to extend the time for filing a statement of facts, where it appears that the only stenographer who took notes on the trial was continuously busy from the time of final judgment until after, and it was impossible for him to get out the statement within, the thirty days allowed by statute, and so notified appellant, and that the extension would not delay the hearing of the case on appeal; and the appellant was not guilty of laches in not ordering a statement and making application for an extension before the expiration of thirty days, where he had been notified that it would be impossible for the stenographer to start work on the statement within that time (MORRIS and CHADWICK, JJ., dissenting).

Certiorari to review a judgment of the superior court for Whatcom county, Pemberton, J., entered July 25, 1913, refusing to extend the time for filing a statement of facts. Reversed.

Newman & Kindall, for relator.

Frank W. Bixby, for respondents.

MOUNT, J.—This is an application for a writ of certiorari to review an order of the lower court refusing to extend the time within which to file a statement of facts in the case of State v. Sefrit, on appeal to this court. The record upon the

¹Reported in 134 Pac. 183.

motion for an extension of time for filing the statement of facts has been certified, and it has been stipulated that this hearing may be had and the decision rendered the same as though the writ had already been issued. We shall therefore proceed to a discussion of the points presented.

It is contended by the respondent that the writ will not issue in this proceeding for the reason that the relator has a plain remedy by appeal. It is apparent, however, that the remedy by appeal is not an adequate one. The judgment from which the appeal was taken in the case of State v. Sefrit, was entered on the 26th day of May, 1913. The statute, Rem. & Bal. Code, § 393 (P. C. 81 § 693), provides:

“A proposed bill of exceptions or statement of facts must be filed and served either before or within thirty days after the time begins to run within which an appeal may be taken from the final judgment in the cause, or (as the case may be) from an order with a view to an appeal from which the bill or statement is proposed: Provided, that the time herein prescribed may be enlarged either before or after its expiration, once or more, but not for more than sixty days additional in all, by stipulation of the parties, or for good cause shown and on such terms as may be just, by an order of the court or judge wherein or before whom the cause is pending or was tried, made on notice to the adverse party.”

The utmost limit for filing the statement of facts under this provision is ninety days after the date of final judgment. If the relator is entitled to a review of this order so that it may be of benefit to him in case it is reversed, it is plain that the order must be reviewed within the ninety days; otherwise, his statement of facts could not be filed in the case. It is also plain that, by the ordinary procedure upon appeal, this order refusing an extension of time cannot be reviewed until after the expiration of the ninety days. If the relator has an appeal from this order, it is too plain for argument that his remedy by appeal is entirely inadequate. We are, therefore, of the opinion that this order may be reviewed by certiorari.

The next question in the case, and the principal one upon

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the merits, is whether the trial court abused its discretion in refusing to extend the time for filing the statement of facts. The affidavits filed show that Egan Ridenour was the stenographer who took notes of the trial of the case of State v. Sefrit; that he was the only stenographer who took notes of the trial, and that no other stenographer could read his notes. These affidavits also show that this stenographer was continuously busy from the time the final judgment was entered, as above stated, until July 5, 1913; that it was impossible for him to get out the statement of facts in this case within the thirty days allowed by the statute. It is also shown that the hearing of the case on appeal would not be delayed by reason of an extension of time for the period of ninety days, as provided in the statute above quoted. It is true that the relator, for several days after his conviction, was undecided whether he would appeal the case or not; that he did not finally make up his mind to appeal the case until on or about June 2, 1913, when he gave his attorneys notice to that effect; and it was not until July 5, 1913, that an order was given to the stenographer to proceed with the preparation of the statement of facts. But, in the meantime, after the judgment and before the order was given, the stenographer had stated the condition of his work, both to the relator and to his counsel and had informed them that it would be impossible for him to do any substantial work upon the statement of facts until about July 1, 1913. It was also shown that the stenographer estimated that there would be about 1,100 pages of the statement of facts, and that it would be impossible for him to employ assistance or to perfect the statement of facts until long after the expiration of the thirty days. The trial court was of the opinion that the statute was mandatory that the statement of facts should be filed within thirty days, unless the time therefor was extended for good cause shown or by stipulation of the parties; and, also, that the appellant had not been diligent in ordering

the statement of facts prepared by the stenographer; and for that reason declined to grant an extension of time.

This court has frequently held that the granting of an extension of time in matters of this kind is largely discretionary with the trial court, and will be reviewed only for an abuse of such discretion. In the case of *Fulton v. Methow Trading Co.*, 45 Wash. 136, 88 Pac. 117, this court said:

“It is contended that the court abused its discretion in not granting an extension of time to file a statement of facts. In the order denying the extension, the court recited that no exceptions were taken to the findings within the time required by law; that appellants had the full time of thirty days to file and serve a proposed statement of facts, and that no sufficient reason had been shown for the extension. We think that these recitals in the court’s order are not overcome by anything in the record which makes it necessary to hold that the court abused its discretion. Much of the contention in this case seems to be due to the fact that appellants changed attorneys during the progress of the proceedings, and that their attorneys were nonresidents. With such considerations existing, and having due regard to respondents’ full rights in the premises, we think, under the record, that the court did not abuse its discretion.”

It is apparent from the rule in that case that the ruling of the trial court upon an application for an extension of time within which to file a statement of facts may be reviewed for abuse of discretion. We are satisfied in this case that the trial court should have extended the time under the facts above stated. No injury could result to either party by reason of an extension of time to the appellant. In view of the fact that the stenographer who took the notes of the trial could not get out the statement of facts under any circumstances within the period of thirty days, and in view of the fact that the appellant and his counsel had been informed thereof, we think the relator was not guilty of laches in not giving a definite order for the statement of facts until after the expiration of the thirty days. The record shows in this case that the order for the statement of facts was not

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given until ten days after the expiration of the thirty days. But we think the excuse for not giving the order before that time was sufficient, especially in view of the fact that the stenographer, on account of the press of work, could not have gotten out the statement of facts prior to that time, or made any substantial progress thereon. It is shown without dispute that the questions to be reviewed upon appeal are questions which arise mainly upon the statement of facts, and that the statement of facts is necessary in order that the appellant may protect his rights on appeal. The denial of an extension of time in this case is a practical denial of the right of appeal. Even though the statute is mandatory that the statement of facts must be filed within thirty days, as we have frequently held, unless good cause for an extension be shown, where good cause is shown it is the duty of the court to grant an extension of time. Good cause was plainly shown in this case, and it is our opinion, considering all the facts which were presented upon the affidavits, that the trial court abused its discretion in not granting an extension.

The order is therefore reversed, and the trial court is ordered to grant an extension of time within the ninety days.

PARKER and GOSE, JJ., concur.

MORRIS, J. (dissenting).—The majority in their opinion hold that it is an abuse of discretion for the trial court to hold that no “good cause” is shown for granting an extension of time in which to file and serve a statement of facts. When the application is not made until the expiration of forty days from the time fixed for the running of the appeal and it is shown that no application has been made to the stenographer to prepare a statement, the only excuse being it could not have been prepared if it had been ordered, it is not for us to say whether or not the lower court should have extended the time. The only question for us to determine is, Did the court abuse its discretion in refusing to extend the time? To say that it did is to hand down a pernicious rule and one

that will, if adhered to, result in bad and loose practice. I therefore dissent.

CHADWICK, J. (dissenting)—Had I been the trial judge, I would have extended the time, but that is not the question. Whether it should be extended was a matter within the discretion of the trial judge. While I think the time should have been extended, I cannot say that there was an abuse of discretion in denying it. I fear the majority has made a question, heretofore one of discretion, judicial and subject to review as in all other cases.

[No. 11235. Department One. August 7, 1913.]

E. W. STETSON *et al.*, *Appellants*, v. THE CITY OF SEATTLE
et al., *Respondents*.¹

MUNICIPAL CORPORATIONS — LEGISLATIVE POWERS — INITIATIVE AND REFERENDUM—ORDINANCES—TIME OF TAKING EFFECT. Under Seattle city charter, art. 4, § 1, adopting the principle of direct legislation, and providing that ordinances may be referred to a vote of the people, either upon petition of voters or by the council acting without petition, the operation of an ordinance is suspended when submitted to a vote by the council, although the charter does not expressly so provide; since the principle of direct legislation would otherwise be violated.

EVIDENCE—JUDICIAL NOTICE. The courts can judicially notice that it might be impossible to hold a referendum election within thirty days after the passage of an ordinance.

MUNICIPAL CORPORATIONS — LEGISLATIVE POWERS — INITIATIVE AND REFERENDUM—ORDINANCES—SUBMISSION—VALIDITY OF ELECTION. Seattle charter, art. 4, § 1, adopting the principle of direct legislation, and providing that any ordinance may be submitted by the city council "by itself without petition," does not require that the ordinance shall call for its own submission, and it may be submitted by resolution.

SAME—POWERS OF COUNCIL—ORDINANCE—AMENDMENT—EFFECT AND NECESSITY OF REFERENDUM VOTE. Under Seattle charter, art. 4, § 1, adopting the principle of direct legislation, and expressly super-

¹Reported in 134 Pac. 494.

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seding, in so far as conflicting therewith, par. 41 of § 18, art. 4, which gave the council the power to alter, amend or repeal any ordinance, the council has no power to alter, amend or repeal a referendum ordinance adopted by the people, but the same must be referred to the people under the simple referendum; especially where the referendum ordinance had not yet gone into effect pending the future date fixed by the people for it to take effect.

SAME—EMPLOYEES—REGULATION OF HOURS OF SERVICE—STATUTES—CONSTRUCTION. A referendum ordinance providing that employees in the marine fire department shall be divided into two platoons for day and night service, the hours for day service not to exceed ten, and for night service, not to exceed fourteen, must be construed as intended to fix the hours for service, and not merely the maximum, and is accordingly repugnant to an ordinance providing for three shifts and an eight-hour day for each shift.

MUNICIPAL CORPORATIONS — FIRE DEPARTMENT — HOURS OF LABOR—REGULATIONS—STATUTES—CONSTRUCTION. Under a Seattle city charter which does not classify the work of the fire department as public work, but excludes it from the jurisdiction of the board of public works, an employee of the fire department is not within art. 23, § 1, of the charter, providing that, in all public works done by the city either by day labor or by contract, eight hours shall constitute a day's labor; and such employee is not a day laborer or a mechanic, within an ordinance limiting the hours of all day laborers and mechanics employed upon any public works of the city to eight hours a day; nor within Rem. & Bal. Code, § 6572 *et seq.*, providing for an eight-hour day on all work done by contract on public works for municipalities, or subsequent state laws applying only to "work by contract or day labor done."

Appeal from a judgment of the superior court for King county, Everett Smith, J., entered March 26, 1913, dismissing an action for equitable relief, upon sustaining a demurrer to the complaint. Affirmed.

William Hickman Moore, for appellants.

James E. Bradford and *William B. Allison*, for respondents.

CHADWICK, J.—The plaintiffs, who are employed by the city of Seattle in the marine fire department, have brought this action to compel the city to fix their hours of work under an ordinance No. 30730, to which we shall presently refer.

Prior to the adoption of ordinance No. 30730, the employees in the marine fire department were controlled by the provisions of ordinance No. 30039. This ordinance was passed by the city council of the city of Seattle on September 16, 1912, and was approved by the mayor on the following day. It provided that "from and after the 2nd day of April, 1913," firemen, other than the fire chief, should be divided into two platoons, one to perform day service and the other night service; "the hours of day service to be not to exceed ten, commencing not before 8 a. m. and ending not later than 6 p. m., and the hours of night service should not exceed fourteen, commencing not before 6 p. m. and ending not later than 8 a. m., except in cases of emergency," and "that in the work the said platoons shall alternate from day to night and from night to day each and every month, and that the ordinance should take effect and be in force from and after its passage and approval."

On the 23d day of September, the city council by resolution submitted ordinance No. 30039 to the people of the city of Seattle for their ratification or rejection. The resolution provided that the ordinance should be voted on at a special election to be held on the 5th day of November, 1912. The election was so held, and a majority of the votes cast were in favor of the ordinance. On the 27th day of January, 1913, the council passed, and the mayor approved, ordinance No. 30730, which provides that, from and after its taking effect, the engineers, pilots and stokers of the fire boats of the fire department of the city should be required to work eight hours per day, and no more, except in cases of emergency. When the ordinance became effective, the marine force was organized into three shifts of eight hours each, and at the time the complaint was filed, were working these hours.

On the 27th day of February, 1913, the chief of the fire department promulgated a special order to the effect that, commencing February 28, the day upon which ordinance No. 30730 went into effect, the marine force should operate

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in three shifts of eight hours daily until April 2, 1913, after which time they should operate under the two platoon system, as provided in ordinance No. 30039; whereupon these plaintiffs, acting in their own behalf and in behalf of all others similarly situated, brought this action to restrain the defendants from enforcing the order of the chief of the fire department. A general demurrer was filed by the defendants and sustained by the court. From a judgment of dismissal, plaintiffs have appealed.

Various errors are assigned, and we will discuss them in their proper order. To do this, it is necessary to refer to the charter of the city of Seattle. The people of the city of Seattle have adopted the principle of direct legislation. A referendum vote of the people may be had upon any ordinance. It may be brought about in one of two ways: first, by petition signed by at least eight per cent of the qualified electors of the city; and second, by the council itself. That part of art. 4 of the city charter wherein provision is made for the simple referendum is as follows:

“Power of simple referendum as to ordinances; exceptions; by petition or by council:—The second power reserved by the people is the simple referendum, and it may be exercised and ordered (except as to ordinances necessary for the immediate preservation of the public peace, health or safety, and except as to ordinances providing for the approval of local improvement assessment rolls and providing for the issuance of local improvement bonds), as to any ordinance which has passed the city council and mayor (acting in their usual prescribed manner as the ordinary legislative authority of the city), either upon a petition signed by a number of qualified voters equal to not less than eight (8) per cent of the total number of votes cast for the office of mayor at the last preceding municipal election, or by the city council itself without petition.”

“Charter provisions superseded:—Any provisions of this charter, and particularly any provisions in section 14 and paragraph ‘forty-first’ of section 18 of this article, insofar

as they are in conflict with the provisions of this section, are hereby superseded." Seattle charter, art. 4, § 1.

Section 14 referred to above is as follows:

"Ordinances, when to take effect:—No ordinance shall take effect until ten days after its passage, unless otherwise expressed in said ordinance. (See § 1, art. 4.)"

Section 18, par. 41, is as follows:

"Amendment and repeal of ordinances:—To alter, amend and repeal any ordinance or ordinances or parts thereof of the city. (See § 1, art. 4.)"

Appellants' first contention is that the ordinance had become a law at the time the election was held, and the election, therefore, could not operate except as an approval; and the council not having acted upon the advice of the voters, but having passed an act which provides for a different system and different hours of work, ordinance No. 30039 has been repealed. It is argued that the ordinance, by its terms and in virtue of the charter, became a law on October 18, 1912, three weeks before the day of the election; that, it being provided in the charter that "the filing of a petition shall operate to suspend the taking effect of the same pending the election," and no such provision being made where the ordinance is referred by the council, no act of the council or of the voters could operate as a suspension of the ordinance pending the election. It is urged that the legislative powers of the city are vested primarily in the council and mayor. This is true in a sense, but not entirely so. Where the principle of direct legislation has been adopted, the legislative power is primarily in the people, and the old rule that the legislative body has primary power must be qualified. It is primary, and at the same time it is a permissive power—a power subject to dictation and to control. "The first power reserved by the people is the initiative and referendum." Charter, art. 4, § 1. Therefore, upon any question involving the power of the council as compared with the power of the whole people,

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we feel bound to hold that, when an ordinance is submitted to the people for their ratification or rejection, whether by act of the council or by petition, the ordinance must stand in abeyance pending such ratification or rejection, otherwise the very principle of direct legislation would be violated, or an election would have to be held at some time within the thirty days elapsing between the time of its passage and the time it would otherwise take effect. We can judicially notice the fact that this might frequently be an impossibility. Many ordinances and laws are passed by legislative bodies which have not had mature consideration, and not until they are enacted is their policy questioned. To hold that the city council must submit an ordinance to a referendum vote within thirty days would be to read out of the charter the provision providing for the simple referendum by the council.

It is next contended that the election has no legal or vital force because the ordinance did not provide that it should be referred. There is nothing in the charter that requires an ordinance to call for its own submission. The fact that an election may be called upon the petition of the voters implies that the people never intended that it should be so. This ordinance was submitted by a resolution of the council. The charter does not require any act on the part of the mayor. It says that an ordinance may be submitted "by the city council itself without petition." Charter, art. 4, § 1.

Having held that ordinance No. 30039 was properly submitted to the people and became a law by their direct vote, it now remains for us to consider the legal effect of ordinance No. 30730. We are concerned with the question whether it is within the power of the council to pass an ordinance which in effect alters, amends, or repeals an ordinance previously adopted by a referendum vote of the people. Counsel takes the broad ground that it must be provided somewhere in the law that the law or ordinance shall not take effect pending a referendum election, and by way of argument has called our attention to the amendment of the constitution,

subdivision "C," chap. 22, Laws 1911, providing that no law approved by a majority of the electors voting thereon shall be revoked or repealed by the legislature within a period of two years following its enactment. We are not called upon to decide whether, as an abstract proposition, this might or might not be the law, for we think that the last paragraph of § 1, art. 4, of the charter, which seems to have been adopted in order to amplify the section devoted to the referendum, settles any doubt that might arise as to the construction of that section. This paragraph must be read in connection with the referendum clause. It supersedes § 18 of the same article, which provides that the council shall "have power to alter, amend, or repeal any ordinance, ordinances or parts thereof" and is quite as effective, if not more binding upon the legislative body, than a provision fixing a time within which the council could not act. We think the charter, taken as a whole, must be held to mean that a referendum ordinance cannot be altered, amended or repealed by any less authority than that which called it into being. We do not question the right of the council to pass any amendatory or repealing ordinance as the charter is now framed, but we believe that it should be referred to the people under the simple referendum.

There is another reason which, in our opinion, will sustain the referendum vote of the people in this instance. By the terms of ordinance No. 30039 it is provided that the ordinance shall be effective from and after April 2, 1913. While the ordinance became a law, it had no force and there was nothing for it to operate upon until the lapse of time—not the time fixed in the charter, but the time fixed in the ordinance. To hold that the council can annul an ordinance passed by the people, pending the future date which a majority of the whole people have fixed for its operation, would be manifestly wrong. It would make the referendum a useless thing, instead of a valuable and controlling check upon hasty and

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ill-advised legislation. If the complaint were not otherwise deficient, it would be held bad for the reason just stated.

The next proposition offered to sustain the complaint is that the ordinances are not antagonistic; that they may be construed together without doing any violence, either to the ordinances themselves or to any rule of statutory construction. It is argued that ordinance No. 30039 does not undertake to fix the number of hours the marine fireman shall work in a day, but only the maximum number of hours.

In considering laws passed by the direct vote of the people, a court should not presume anything that would negative the natural inferences that may be drawn from the act itself. The ordinance provides that there shall be two platoons, and fixed the hours that each platoon shall work. We would have to go beyond the terms of the law and resort to technical reasoning to follow counsel in his present contention. It is evident that the public considered the hours fixed in the ordinance, which are ten for day service and fourteen for night service. We find no merit in this contention.

Finally, it is contended that ordinance No. 30039 is in violation of § 1, art. 23 of the charter, wherein it is provided that "in all public works done by or for the city, either by day's work or by contract, eight hours shall constitute a day's work. . . . This article shall be enforced by the city council by ordinance."

Ordinance No. 5162 provides:

"That the services and employment of all day laborers and mechanics who are now or hereafter may be employed from time to time by the city of Seattle, or by any contractor or sub-contractor, upon any of the public works of the city of Seattle is hereby limited and restricted to eight (8) hours in any one calendar day"

Reliance is also put on Rem. & Bal. Code, § 6572 (P. C. 291 § 115):

"Hereafter eight hours in any calendar day shall constitute a day's work on any work done for the state or any

county or municipality within the state, subject to conditions hereinafter provided."

As will be noticed, this section concludes with the words "subject to conditions hereinafter provided," and it must be construed with reference to the remaining section of the act of which it is a part. Laws of 1899, page 163, ch. 101, § 2; Rem. & Bal. Code, § 6573 (P. C. 291 § 116). The second section of the act provides that:

"All work done by contract or subcontract on any building or improvements or works on roads, bridges, streets, alleys or buildings for the state or any county or municipality within the state, shall be done under the provisions of this act: Provided, that in cases of extraordinary emergency, etc. . . ."

It also provides that "*this act*" shall be made a part of all contracts for work done for the state or any county or municipality within the state. The third and last section imposes penalties on contractors, subcontractors or their agents who violate the provisions of the act. The act cannot be read to cover the case of the appellants without rejecting all of it except the first three lines, as well as ignoring utterly the enacting clause, which is as follows:

"An act to establish the number of hours to constitute a day's work on all state, county and municipal construction or such work done by contract or sub-contract, and providing penalties for its violation." Laws 1899, page 163.

This act must also be construed in the light of the subsequent enactment of the legislature. Laws of 1903, page 51, wherein it is provided:

"It is a part of the public policy of the state of Washington that all work 'by contract or by day labor done' for it, or any political subdivision created by its laws, shall be performed in work days of not more than eight hours each, except in cases of extraordinary emergency . . ."

Subsequent sections refer to contract work. It was evidently passed to cure certain omissions in the previous act.

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It provides that there shall be no case of "extraordinary emergency" where other labor can be found to take the place of labor which has already been employed for eight hours, and also directs the officers authorized to contract for or supervise the execution of any public work to cancel a contract if it is not performed in accordance with the declared policy of the state. The enacting clause of this piece of legislation is in keeping with the other.

"An act declaring it to be a part of the public policy of the state of Washington that all public work for it, or any political subdivision created by its laws, shall be performed in work days of not more than eight hours each. . . ." Laws 1908, p. 51.

This state has not legislated upon the subject of hours for men's work excepting in so far as it affects labor upon public works or work done "by contract or day labor done." Our laws, as they are at present written, apply only to those who work by the day and are paid by the day, or who come within the definition of contract labor upon public works.

That the people of the city of Seattle had in mind, and intended to preserve, this distinction is to be inferred, not only from the words of the charter and ordinance, but from the further fact that the charter has divided the several functions of the city and provided for their exercise by separate boards. Article 8 covers "the department of public works." In this article reference is made to such matters as would naturally be classed as public work. Article 11 covers "the fire department." There is nothing in this article that would suggest that firemen are laborers employed upon "any public works of the city." A further instance of popular construction is to be found in the ordinance quoted above. It will be remembered that the charter, § 1, art. 18, provides: "This article shall be enforced by the city council by ordinance." The ordinance, it will be seen, was drawn so as to include only *day laborers and mechanics* who may be employed upon any of the public works of the city. It

cannot be seriously contended that an employee of the fire department is either a day laborer or a mechanic within the meaning of this ordinance. The fact that the people have adopted a charter which does not classify the work of the fire department as public work, but on the contrary excludes it from the jurisdiction of the board of public works, makes this certain. Furthermore, the use of the words "contractor or subcontractor" would imply that the people of Seattle understood the words "public works" to mean such work as was usually done with day labor by contractors, or which might, if the council so ordered, be done by the city itself.

The case of *Davies v. Seattle*, 67 Wash. 532, 121 Pac. 987, is relied on. Davies was a day laborer, engaged in a work recognized as public work, and classified as such within the defined powers of the board of public works. Neither that case nor the case of *Wilson v. Zulueta*, 14 Q. B. 405, 19 L. J., Q. B. 49, mentions or meets the question we are now called upon to decide.

In the absence of a statute, courts cannot fix hours of labor. The privilege of fixing hours for respondents to work is with the people of Seattle, and respondents must look to them for their remedy.

Affirmed.

GOSE, PARKER, and MOUNT, JJ., concur.

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Syllabus.

[No. 11156. Department One. August 7, 1913.]

ALVIN KINCAID, *Respondent*, v. THE CITY OF SEATTLE,
Appellant.¹

MUNICIPAL CORPORATIONS—CLAIMS—ACTIONS — CONDITIONS PRECEDENT—WAIVER. The requirement that a claim against a city for damages sounding in tort shall be verified and shall state the residence of the claimant is made mandatory by Rem. & Bal. Code, §§ 7996, 7997, and therefore a condition precedent to action, which cannot be waived by the city.

EMINENT DOMAIN—TAKING FOR PUBLIC USE—INJURY TO ABUTTERS. Where a city extends the slope of the fill in street grading work onto abutting property there is a taking of the property for public use, within Const., art. 1, § 16, providing that no property shall be taken for public use without compensation.

MUNICIPAL CORPORATIONS — CLAIMS — “SOUNDING IN TORT”—EMINENT DOMAIN—COMPENSATION FOR PROPERTY TAKEN. The right to recover compensation for property taken by a city for public use under Const., art. 1, § 16, is not a claim “sounding in tort” within Rem. & Bal. Code, § 7995, requiring claims against a city for damages sounding in tort to be presented as a condition precedent to action; since the city in taking property acts in its sovereign capacity and not as a wrongdoer or trespasser, strictly speaking, and the constitutional guarantee of compensation cannot be made to depend on statute law (Gose, J., dissenting).

SAME—CLAIMS—COMPENSATION FOR PROPERTY TAKEN. The right to recover compensation for property taken by a city for public use under Const., art. 1, § 16, is not a claim for damages or a contract claim within Seattle charter, art. 4, § 29, requiring all claims for damages against the city to be presented as a condition precedent to action; since the constitutional right to compensation cannot be so taken away (Gose, J., dissenting).

EMINENT DOMAIN—COMPENSATION—INJURY TO PROPERTY—MEASURE OF DAMAGES. The measure of damages for extending the slope of a fill in street grading work onto abutting property is the difference between the fair market value of the property before and after the taking; and not the cost of removing the earth and building a bulkhead.

TRIAL—INSTRUCTIONS—ERRORS CURED. Erroneous instructions on the measure of damages are not cured by proper instructions, where the court excluded all the testimony to which the proper instructions could apply.

¹Reported in 134 Pac. 504; 135 Pac. 820.

Appeal from a judgment of the superior court for King county, Humphries, J., entered March 4, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages to property. Reversed.

James E. Bradford and *Melvin S. Good*, for appellant.

France & Helsell, for respondent.

CHADWICK, J.—This action was brought to recover damages done to the property of the plaintiff by reason of the grading of a certain street in the city of Seattle. Plaintiff was the owner of abutting property. In grading the street to its full width, the slope of the fill necessarily extended over onto plaintiff's lots. The city had not obtained the right to do this by condemnation or otherwise. Thereafter plaintiff filed a claim for damages. No formal action, other than to place the claim on file, was taken by the city, and after a time plaintiff brought this action asking to have his damages assessed. From a verdict in his favor, the city has appealed.

The first assignment is that the claim filed by the plaintiff is insufficient in form. Section 7995, Rem. & Bal. Code (P. C. 77 § 183), provides:

“Whenever a claim for damages sounding in tort against any city of the first class shall be presented to and filed with the city clerk or any other proper officer of such city, in compliance with valid charter provisions of such city, such claim must contain, in addition to the valid requirements of such city charter relating thereto, a statement of the actual residence of such claimant, by street and number, at the date of presenting and filing such claim; and also a statement of the actual residence of such claimant for six months immediately prior to the time such claim for damages accrued.”

By its terms, the act of which this section is a part provided that it should in no way modify, limit, or repeal any valid charter provision relating to claims, but should be considered therewith. Rem. & Bal. Code, § 7996 (P. C. 77

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§ 135). Section 7997 of the code (P. C. 77 § 137), is as follows:

“Compliance with the provisions of this act is hereby declared to be mandatory upon all such claimants presenting and filing any such claims for damages.”

The charter of the city of Seattle, art. 4, § 29, is as follows:

“All claims for damages against the city must be presented to the city council and filed with the clerk within thirty days after the time when such claim for damages accrued and no ordinance shall be passed allowing any such claim or any part thereof or appropriating money or other property to pay or satisfy the same or any part thereof, until such claim has first been referred to the proper department, nor until such department has made its report to the city council thereon, pursuant to such reference. All such claims for damages must accurately locate and describe the defect that caused the injury, accurately describe the injury, give the residence for one year last past of claimant, contain the items of damages claimed and be sworn to by the claimant. No action shall be maintained against the city for any claim for damages until the same has been presented to the city council and sixty days have elapsed after such presentation.”

The claim filed by plaintiff was not verified; neither did it state the place of residence of the claimant. The lower court seems to have considered the claim to be insufficient in form, but instructed the jury that it might find upon certain testimony offered by respondent that the city had waived technical compliance with the provisions of the statute and the charter. These provisions have, since the passage of the act of 1909, been held by this court to be mandatory; and therefore a condition precedent to the bringing or the maintenance of an action. *Cole v. Seattle*, 64 Wash. 1, 116 Pac. 257, Ann. Cas. 1913 A. 344, 34 L. R. A. (N. S.) 1166; *Collins v. Spokane*, 64 Wash. 153, 116 Pac. 663, 35 L. R. A. (N. S.) 840; *Benson v. Hoquiam*, 67 Wash. 90, 121 Pac. 58.

We are asked to construe the statute and to overrule or distinguish certain of our former decisions; but, from the view we take of the case, it will be unnecessary to follow the arguments of counsel or to even review our former decisions touching claims against municipal corporations. If this action "sounds in tort" it must be admitted that the claim is within the letter of the statute. If it be for breach of contract, then it is governed by the case of *Postel v. Seattle*, 41 Wash. 432, 83 Pac. 1025, and must comply with the provisions of the charter. The *Postel* case is vigorously attacked, but inasmuch as the doctrine of that case will be further considered by this court in the case of *International Contract Co. v. Seattle*, post p. 662, 134 Pac. 502, reheard July 21, we will not discuss it, but admit that it is sound.

Notwithstanding the statutes and the charter, respondent contends that a claim for a damage such as he has suffered is not an ordinary contract claim, and does not have to be presented to the council; that to require it to be done is in violation of § 16, art. 1 of the state constitution, providing that property shall not be taken for a public use without compensation. Whatever its method, the city has taken respondent's property for a public use in virtue of its sovereignty, and subject only to the limitations to be found in the constitution. When taking private property for a public use, the state acts in its sovereign capacity. *Gasaway v. Seattle*, 52 Wash. 444, 100 Pac. 991, 21 L. R. A. (N. S.) 68; *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670. It goes not as a trespasser, inspired by selfish or unlawful motive, but as one taking without malice or intent to do wrong and presumptively for the public good. It cannot put on the cloak of a tortfeasor under the statute if it would. It cannot plead a wilful wrong to defeat a just claim. The rule comes from our original conception of sovereignty, that the king, the sovereign, or, in modern times, the sovereign which is the people acting in their own behalf, will not and therefore cannot do any

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wrong. It was so written and was the law in England, whence our jurisprudence comes. The sovereign could take the property of the individual unto himself, or for the kingdom, or he could give it to another. As civilization developed and civil rights became more secure, when vassalage gave way to the dignity of citizenship, the right of the sovereign, or the sovereignty as we have it in this country, though not denied, was leavened with that basic principle of elemental justice which demands that no man shall give unwillingly unless he is paid in money for that which is taken from him. The constitution does not give the right to take; that is inherent in the state. Its only office is to define the limitations to be put upon its exercise; that is, that no property shall ever be taken without compensation.

Having the right to take, a municipality, whatever its procedure or even lack of procedure, is not a wrongdoer. The remedy of the one whose property is taken is immaterial so long as it leads to compensation as provided in the constitution. The city is bound to make compensation under a compact no less formal than the constitution itself, and it cannot defeat this constitutional right by a charter provision or an ordinance, nor can the legislature take it away by any arbitrary requirement, although we may admit that it could, as in all other cases, fix a time within which an action must be brought to recover damages that have not been first ascertained and paid. The city must be held to adopt the guarantee of the constitution and make it its promise, for we know of no law that will impute to the city, when exercising the sovereign power of the state, a wilful intention to disregard the right of a citizen.

"The right of eminent domain being recognized by the supreme law of the land, it would involve a contradiction to hold that in the exercise of that right there can exist the legal elements of a wrong. In the civil economy of political society whatever is legal is right; the power of eminent domain is legal, and is therefore right; being right in legal contemplation it excludes from the transaction to which it is

properly applied all wrong, and therefore all tort. The taking of private property without the consent of the owner on the part of an individual is a wrong *per se*; but not necessarily so upon the part of the government, as it has the constitutional right to take private property against the will of the owner, subject to the condition of paying for it. Individuals hold their property subject to the wants and necessities of the public, and if in the exercise of the right of eminent domain the public appropriate such property, a compensation in value is the only redress due the owner." *Merriam v. United States*, 29 Court of Claims 250.

"It is doubtless true that a 'claim of right to condemn' cannot be predicated solely upon wrongful possession, but it is also true that the right itself is not extinguished by such possession." *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670.

"The acts complained of in this case, if done without authority of law, would be wholly unjustifiable. But having been performed in the execution of a power conferred by the legislature [we may here say in the exercise of the state's inherent right], and of consequence under the sanction of the law, their legal character was changed. It would be absurd to say that they were tortious and illegal." *Brown v. Beatty*, 34 Miss. 227, 69 Am. Dec. 389.

"The constitution also provides that, whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public. Under the constitutional guaranty, the owner of the land appropriated in this case by the county could not be compelled to present a claim for damages. He can remain quiet and be assured that before his property is condemned the county must ascertain his damage, and either pay it to him or pay it into court for his benefit and the amount of his damages must be ascertained in a court, in a proceeding instituted for that purpose, and in which the defendant can appear and make his showing, if he so desire." *Peterson v. Smith*, 6 Wash. 163, 32 Pac. 1050.

"To give effect to a law of this kind would be to substantially overthrow the provision of our constitution which pro-

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vides, in § 16 of art. 1, that no private property shall be taken or damaged without just compensation having been first made or paid into court for the owner. It is true that, if the owner comes into court and files his claim for damages, the law provides machinery for having it ascertained and paid, but, if for any reason he does not so appear and file his claim, the property is to be taken without this provision of the constitution having been in any manner complied with." *Askam v. King County*, 9 Wash. 1, 36 Pac. 1097.

"The relator was admittedly a trespasser, and while it lost no right by reason of its trespass, neither did it gain any. The only consideration we can give to the trespass is to accord to it the same force as a formal selection of that route across respondents' land." *State ex rel. Postal Telegraph Cable Co. v. Superior Court*, 64 Wash. 189, 116 Pac. 855.

See, also, *Snohomish County v. Hayward*, 11 Wash. 429, 39 Pac. 652.

The action for damages for land taken without compensation is usually spoken of, and is in its nature, one of trespass; but it is not strictly so. If the state or its agent, in the prosecution of a public work, takes no more than is necessary, and prosecutes its work without negligence, it is neither a trespasser nor a tortfeasor. This principle is the controlling one in *Lund v. Idaho & Washington Northern R. Co.*, 50 Wash. 574, 97 Pac. 665, 126 Am. St. 916, where it was held that, having a right, a railroad company would not be ejected although an injunction would issue pending a trial to fix damages. This case is later in time and, in the opinion of the writer, is better considered than the earlier case of *Owen v. St. Paul, M. & M. R. Co.*, 12 Wash. 313, 41 Pac. 44, where it seems to have been held that ejectment would lie without qualification.

In *Kakeldy v. Columbia & Puget Sound R. Co.*, 37 Wash. 675, 80 Pac. 205, it was held that one who acquiesces in the construction and operation of a railroad "is estopped thereafter to maintain ejectment or a suit for injunction to prevent the operation of the road. His remedy is limited to an action for damages."

The following cases did not turn upon the question of claim, but they logically hold that it would violate the constitutional right of the property owner if he were required to initiate his right to compensation by any affirmative act.

"If the legislature could rightly require of the land owner one affirmative and initiatory act as a condition precedent to obtaining damages, they might require of him any other, or a series of acts which might be difficult or onerous or, in some circumstances, impossible of performance, and so the constitutional guaranty might thus be seriously impaired or wholly frittered away. We are of opinion that the spirit, if not the letter, of the constitution, requires that the public seeking to appropriate private property to its use should, unless damages have been waived by some affirmative and unequivocal act, take steps of its own motion to ascertain their amount and secure their payment, and that mere passive acquiescence by an individual in the appropriation of property, unaccompanied by any conduct indicative of affirmative assent thereto, should not, unless continued for the statutory period of limitations, be regarded as a waiver of his rights." *Kime v. Cass County*, 71 Neb. 677, 99 N. W. 546, 101 N. W. 2.

"Obtaining by grant from the owner, or by adverse possession long enough to bar his claim to the property, or by condemning and paying for it, are the only modes of obtaining private property for public use in this state; and no act which devolves on the owner the duty of initiating proceedings for compensation for his property, as the condition of his obtaining it, is allowable. He cannot be required to become an actor, under the penalty of losing his property, and 'due compensation' for it, if he shall not." *Yazoo-Mississippi Delta Levee Board v. Dancy*, 65 Miss. 335, 3 South. 568.

"The public receives the benefit from the location of the road and must bear the burden of compensation for the land taken. The law should be construed in such a way as to do justice, and no strict rule applied that will rob a party of his property." *Pawnee County v. Storm*, 34 Neb. 735, 52 N. W. 696.

Mr. Lewis says the provisions of the constitution are imperative, and any law which violates them is incapable of en-

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forcement. Lewis, Eminent Domain (3d ed.), § 676. We are not without authority in our own state to sustain these general principles. It was held in *Adams County v. Dobschlag*, 19 Wash. 356, 53 Pac. 339, that a statute designed to put the property owner to the hazard of costs, in the event that he failed to recover more than had been tendered, was unconstitutional. This case was reaffirmed in *Kitsap County v. Melker*, 52 Wash. 49, 100 Pac. 150. In *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385, where it was sought to substitute a bond for the actual payment of money, the court said:

“The protection to the owner of property is not the protection guaranteed by a bond upon which suit would have to be instituted, and the party subjected to all the delays and dangers incident to a lawsuit, with the possibility of bondsmen becoming insolvent, nor any other compensation that is coupled with doubtful results, vexations, or delays. But the guaranty is that no private property shall be taken or damaged without just compensation having been first made, or paid into court for the owner.”

The case of *Hart v. Seattle*, 45 Wash. 300, 88 Pac. 205, arose out of a claim for damages resulting from a change of grade. Plaintiff sought his remedy in equity. The logic of the court's holding is that there was a taking without compensation, and that the ordinance requiring claims for damages to be presented had no application to “a case of this character.”

This holding proceeds upon the theory that the wrong committed is not in the act of taking, but in the manner of taking, for “title to property is always held upon the implied condition that it must be surrendered to the government either in whole or in part, when the public necessities, evinced according to the established forms of the law, demand.” 15 Cyc. 557; citing: *Hale v. Lawrence*, 21 N. J. L. 714, 47 Am. Dec. 190; *People v. Mayor etc. of New York*, 32 Barb. 102; *Mack v. Eastern & N. R. Co.*, 10 Pa. Dist.

102; *Leisse v. St. Louis & Iron Mountain R. Co.*, 2 Mo. App. 105; *Raleigh & G. R. Co. v. Davis*, 19 N. C. 451.

So it will be seen that, where the petitioner is about to take possession without condemnation, injunction is a proper remedy; where there has been a taking and the public function is being exercised, the only remedy is to take compensation. Whether we call the taking a tort, or say that the claimant can waive the tort and sue on an implied contract, it makes no difference; the law is the same. The constitutional right to compensation cannot be taken away, for the right to redress the wrong does not and cannot be made to depend upon statute law. The remedy is in the courts having jurisdiction to redress wrongs under the forms of the common law. "The remedy is commensurate with the wrong." *Keill v. Grays Harbor & Puget Sound R. Co.*, 71 Wash. 163, 127 Pac. 1113. The owner being estopped to deny the right, and the petitioner being bound to meet the demands of the constitution, it would be illogical in the extreme to hold that the petitioner should be permitted to insist upon something that, if it had proceeded regularly, it was bound to ascertain in a proceeding in which the claimant does not even have to file an answer.

We hold that the right to recover compensation for property taken by a city for a public use under § 16, art. 1, of the constitution, is not a claim "sounding in tort," within the meaning of the statute, Rem. & Bal. Code, § 7995 (P. C. 77 § 133), or a contract claim within the meaning of the charter of the city of Seattle as construed in *Postel v. Seattle*, *supra*.

The court was of opinion that the city could not show that there had been no depreciation in the market value of the property by reason of the improvement, and rejected all testimony offered to prove this fact. The court said: "I think the measure of damage is the moving of the earth and replacing the fences and everything of the kind." The character and plan of the improvement was for the city to de-

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termine, and the property owner is bound by it. *Hinckley v. Seattle*, ante p. 101, 132 Pac. 855. It might have put in a bulkhead or wall, or it might have adopted a plan for a slope. In the absence of a plan, the city is bound by its act, and damages must be assessed upon the theory that the slope will remain. If the slope is a damage, it can be measured under the general rule, i. e., the fair market value of the property before and after the taking. This measure is comprehensive, and except in rare instances, will cover all items of damage. It is approved by all textwriters and has the sanction of this court. *Seattle & M. R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. 864; *Enoch v. Spokane Falls & N. R. Co.*, 6 Wash. 393, 33 Pac. 966; *Kaufman v. Tacoma, Olympia & Grays Harbor R. Co.*, 11 Wash. 632, 40 Pac. 137; *Murphy v. Chicago, Milwaukee & St. Paul R. Co.*, 66 Wash. 663, 120 Pac. 525.

The court instructed the jury upon the theory that the jury might estimate the cost of removing the fill and building a bulkhead. This was improper. *Jones v. Seattle*, 23 Wash. 753, 63 Pac. 553. It is contended that, notwithstanding all this, the court did instruct the rule of market value. It is true that some of the instructions refer to this rule, but they cannot be held to control the objectionable instructions, for the reason that the court excluded all testimony offered by the city to which they might have been made to apply.

For the reason last assigned, the case is reversed and remanded for a new trial.

CROW, C. J., PARKER, and MOUNT, JJ., concur.

GOSE, J. (dissenting).—The action either sounds in tort or arises out of a contract, express or implied. If it sounds in tort, the statute governs; if it is upon contract, it is controlled by the city charter. The majority opinion rests upon the fiction that the sovereign can do no wrong. The respondent asserts that it has done a wrong and the suit is

waged to redress the wrong. A property right resting upon the constitution is no more sacred than any other property right. As I read the cases, they do not support the view taken by the majority. I think that the failure of the respondent to properly present his claim precludes a recovery. Upon that ground only, I dissent.

ON PETITION FOR REHEARING.

[*En Banc*. October 18, 1913.]

CHADWICK, J.—A petition for rehearing has been filed wherein it is charged that our decision leaves the question of presentation of claims under the Seattle charter in a chaotic condition. It is insisted that the facts in *Postel v. Seattle*, 41 Wash. 432, 83 Pac. 1025, are identical with the facts in the present case, and that inasmuch as we did not in our opinion overrule the *Postel* case but admitted [the petitioner says reaffirmed] it to be the law, that we now have two cases upon identical facts, the one holding that a claim must be presented, and the other that it may not be. It is to be regretted that decisions of appellate courts cannot be written so that they state the law to the satisfaction of counsel on both sides of a case. We are arraigned because it is said that we held that the *Postel* case arose in contract. We did not say that the *Postel* case was a case arising in contract. We did say that if the claim arose in contract it would be governed by the *Postel* case, for, as we said in *International Contract Co. v. Seattle*, 69 Wash. 390, 125 Pac. 152:

“We have no doubt of the intention of the court to hold in the *Postel* case that all claims for damages whether sounding in tort or contract, must be presented within the time and in the manner there provided.”

There is an expression in that case which should be noticed. We said:

“In the *Postel* as well as the *Jurey* case, the city violated a positive duty to protect the property of the citizen and to col-

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lect and distribute to him that which was his lawful due under a positive contract."

The inadvertent reference to the *Postel* case will appear to one who reads these cases, and is made certain by the reference to the *Jurey* case which follows the quotation we have just made. In the *Postel* case, it was decided that the charter provisions of the city of Seattle applied to all cases whether arising in tort or in contract, and this holding, after rehearing and reargument, has been adhered to in *International Contract Co. v. Seattle*, post p. 662, 134 Pac. 502, and *Connor v. Seattle* (Wash.), decided Oct. 10, 1913. The question raised in the principal case, that is, whether a claim for property taken or damaged in violation of art. 1, § 16 of the constitution would have to be presented, was not discussed by the court and not decided. No condemnation had been made in the *Postel* case, and in so far as it may be considered as an authority that a city can ignore the constitution and take the law in its own hands, it is, in effect, overruled by the principal case. *Casassa v. Seattle* (Wash.), 134 Pac. 1080.

Counsel complains that the appellant had made improvements without first condemning the interest of the owner and ascertaining his damage, relying upon the fact that a claim would have to be presented in such cases, and that our decision will subject it to litigation. The answer to this is that the constitution is plain, and this court is not responsible for the fact that the city proceeded in violation of private right. In this case the city damages the property of the respondent "without compensation first made and paid into court." We have gone as far as justice requires, and further than many courts have gone, in holding that the law will not compel a city to undo its work pending the payment of damages. We are unwilling to hold that a city can plead a violation of a constitutional guarantee and justify its wrong by invoking some ordinance or statute.

Neither has the court written any exception into the law in violation of our words in *International Contract Co. v. Seattle*, *post* p. 662, 134 Pac. 502, as is insinuated in the petition; we have sought only to preserve an exception that the whole people of the state adopted for their own protection against municipalities and other public agencies who seek to put private property to a public use.

We have not announced a new rule. The governing principle runs through the decisions of this court which we have cited and quoted. To hold otherwise would be to hold that unless the property owner protected himself with an injunction before the work is begun, he would be without remedy except upon such terms and conditions as the city might prescribe. Having the right to proceed, the city could proceed in all cases without condemnation in the hope that the property owner might be ignorant of the invasion of his property until the time for the presentation of claims had expired. It seems clear that we must either hold that the city must first condemn in all cases, or that it must meet the damages in a subsequent suit. For the reasons stated in the opinion, we prefer to hold to the latter proposition.

An owner of private property in a city has few rights that the city is bound to respect, but the rights which the constitution gives him are his, and until the people modify their will, no city can take them away. The principal case has been approved by the members of department two in the *Casassa* case, so that it has the sanction of eight members of the court.

No attempt has been made to meet our argument or the logic of the authorities upon which our opinion is made to rest; counsel is content to base his plea upon his conception of the *Postel* case and the rule of *stare decisis*. We have undertaken to show that the *Postel* case does not control, consequently the rule invoked does not pertain.

Petition denied.

ALL CONCUR.

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Opinion Per MOUNT, J.

[No. 11008. Department One. August 8, 1913.]

H. E. ORR, *Appellant*, v. SCHWAGER & NETTLETON,
INCORPORATED, *Respondent*.¹

CONTINUANCE—NEW TRIAL—GROUNDS—SURPRISE. It is not ground for a continuance or a new trial that plaintiff was surprised by the testimony of one of the opposing parties, called by him as a witness to prove one of the issues, who testified substantially as he had pleaded, and any newly discovered evidence would merely impeach or discredit the witness.

BROKERS—COMMISSIONS—CONTRACT—EVIDENCE—SUFFICIENCY. In an action to recover a broker's commission on the sale of corporate stock, a nonsuit is proper, where the weight of the evidence was to the effect that a commission was to be paid by others than the defendant, and only in case a sale was made in excess of fifty per cent of the par value, but that no such sale was made, and that the defendant was not interested in the sale and had not agreed to pay the commission.

Appeal from a judgment of the superior court for King county, Wilmon Tucker, Esq., judge *pro tempore*, entered July 8, 1912, upon granting a nonsuit, in an action on contract tried to the court. Affirmed.

Dudley G. Wooten, for appellant.

Bausman & Kelleher, for respondent.

MOUNT, J.—This action was commenced by the plaintiff in May, 1909, to recover a commission on the sale of certain shares of stock owned by John W. Edgecomb and wife and W. A. McDonald and wife in the Riverside Timber Company, a corporation. Plaintiff alleged that, in November, 1908, the owners of the stock agreed to pay him a commission of three per cent upon the selling price for his services in finding a purchaser; that he found a purchaser and that a sale was made by the owners sometime in January, 1909, for the sum of \$235,000; that the amount of his commission was \$7,050; that all the agreements in relation thereto were oral.

¹Reported in 134 Pac. 501.

In that action, John W. Edgecomb and wife and W. A. McDonald and wife and Schwager & Nettleton, a corporation, were made parties defendant. The cause was not brought on for trial until July, 1912. In the meantime, the complaint was twice amended. In the second amended complaint, Schwager & Nettleton, a corporation, was the only defendant, the other defendants having been eliminated by amendments. In the complaint upon which the trial was had, in addition to the facts alleged in the first complaint, it was alleged that the defendant, Schwager & Nettleton, Incorporated, agreed to pay the commissions due the plaintiff as a part of the consideration for the purchase of the stock; that plaintiff thereupon released Edgecomb and McDonald from the payment of said commission; that the defendant thereby became indebted to the plaintiff in the sum of \$7,050.

The cause came on for trial before a special judge *pro tempore* without a jury. After the plaintiff's evidence was submitted, the defendant moved the court for a nonsuit, upon the grounds that the evidence showed no liability against the defendant, that there was no contract entered into between the plaintiff and the defendant, and that the plaintiff had failed to support his cause of action as alleged in the complaint. The trial court sustained this motion, and dismissed the action. The plaintiff has appealed.

At the close of the appellant's evidence, he called as a witness Mr. Louis Schwager, one of the principal stockholders in the defendant corporation. He testified, in substance, that the Schwager & Nettleton corporation did not purchase the stock of the Riverside Timber Company, but that he and Mr. Nettleton and one or two others purchased the stock individually; that the Schwager & Nettleton corporation was not interested in the purchase. Appellant thereupon asked for a continuance of the cause until proofs could be obtained to contradict the witness. This request was denied. After a judgment of nonsuit had been entered, appellant filed a motion for a new trial upon the ground of surprise, claiming, in sub-

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stance, that the witness Mr. Schwager, after the purchase of the stock, had represented to certain commercial agencies that the stock was the property of Schwager & Nettleton, Incorporated, and that appellant was not prepared at the time of the trial to show these facts; that it was newly discovered evidence. The court denied this motion.

Appellant argues that the court erred in denying the motion for a continuance and in denying the motion for new trial. The answer of the respondent to the complaint was a general denial, so that the appellant was put upon his proof as to all the facts alleged in the complaint. It was necessary for the appellant to prove that the corporation of Schwager & Nettleton had assumed the obligation to pay the commission upon the sale of the stock. A party is not entitled to a new trial simply because he was surprised by testimony falling within the issues of the case; and especially where, as here, the appellant calls one of the opposing parties to prove his case. He must not be surprised when the opposite party testifies substantially as he has pleaded.

"Ordinarily, the pleadings must determine what issues will be tried; and it has never seemed to be the practice that a party must disclose to his adversary what his testimony will be, or that he must suggest testimony for his adversary." *McDougall v. Walling*, 21 Wash. 478, 58 Pac. 669, 75 Am. St. 849.

This court has several times held that, where the only purpose of newly discovered evidence is to impeach or discredit evidence produced at the trial, a new trial will be denied. *Scandinavian American State Bank v. Downs*, 72 Wash. 79, 129 Pac. 894; *Seattle Lumber Co. v. Sweeney*, 43 Wash. 1, 85 Pac. 677; *Harvey v. Ivory*, 35 Wash. 397, 77 Pac. 725. We are satisfied, therefore, that the trial court did not err in refusing to grant the motion for continuance, nor in denying the motion for new trial.

The appellant argues at some length that, upon the whole case, the trial court should have denied the motion for nonsuit,

for the reason that the evidence was sufficient to warrant a judgment in favor of the appellant. We have carefully read all the evidence in the case, and are satisfied that the trial court was right. Even conceding that Mr. Schwager and Mr. Nettleton owned and controlled the respondent corporation, and that whatever contract existed between Schwager & Nettleton and the appellant was in substance and in law the contract of the respondent company, we are still of the opinion that there was no evidence sufficient to warrant a judgment in favor of the appellant. The only testimony in the record is the testimony offered on behalf of the appellant. Mr. Edgecomb, with whom the original contract for commissions was made, testified, in substance, that the contract was that Mr. Orr should sell his stock in the Riverside Timber Company, and that of his partner, which together constituted about 47 per cent of the stock of the Riverside Timber Company, so as to net fifty per cent of its par value to Mr. Edgecomb and Mr. McDonald; that whatever commissions Mr. Orr was to receive were to be above the net price; that, in pursuance of this agreement, Mr. Orr attempted to sell the stock to Schwager and Nettleton; that he offered part of the stock to them at 55 cents and part of it at 60 cents on each dollar par value; that Schwager and Nettleton agreed to take the stock at this price provided a mortgage amounting to \$20 per share should be deducted from the selling price of the stock; that Mr. Edgecomb and Mr. McDonald, when this proposition was submitted to them, absolutely refused to sell at that price; that the least price they would sell for was fifty per cent par value; that thereafter Schwager and Nettleton agreed with Edgecomb and McDonald to pay them fifty per cent and the stock was sold on that basis, and not on the basis of any agreement other than fifty per cent. It is true that Mr. Orr testified that he was to sell the stock at fifty per cent net to Edgecomb and McDonald, but that he also had an agreement that his commission was to be three per cent of the selling price. In other words, it is not clear from the

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testimony of the appellant that his contract was that he was to have three per cent of the selling price of the stock in the event that the stock was sold for fifty cents or less. We think the great weight of the evidence is to the effect that his commission was to be what he could obtain above fifty cents. This case, therefore, does not fall within the rule in *Merritt v. American Catering Co.*, 71 Wash. 425, 128 Pac. 1074, for the appellant did not find a purchaser who was ready and able to purchase at the price given to appellant.

The record in this case shows that, if there was any liability for the commission, it was against Mr. Edgecomb and Mr. McDonald, who had agreed to pay the commission to the appellant. We find no evidence whatever that the appellant ever released Edgecomb and McDonald; or that the respondent in this case or Schwager and Nettleton personally ever agreed to pay the commission. It is true that, when the contract was finally closed between Edgecomb and McDonald on the one side, and Schwager and Nettleton and others on the other, an option was given by Mr. Edgecomb, in consideration of one dollar, to Schwager and Nettleton to purchase all the stock which Edgecomb owned in the Riverside Timber Company at fifty cents on the dollar, net, "any commission to Orr to be paid by you." But the evidence of Mr. Edgecomb, called as a witness by the appellant, shows that at that time he stated to Mr. Schwager that Mr. Orr was entitled to no commission because his commission depended upon a sale at a price in excess of fifty cents net. We are satisfied, therefore, that upon all the evidence the court properly directed a judgment of nonsuit.

There are other questions referred to in the briefs which we think require no further notice.

The judgment of the trial court is therefore affirmed.

PARKER, GOSE, and CHADWICK, JJ., concur.

[No. 11059. Department One. August 8, 1913.]

M. N. KNUPPENBERG, *Respondent*, v. D. H. LEE, *Appellant*.¹

MONEY PAID—RECOVERY—DEFENSES—EVIDENCE—SUFFICIENCY. In an action to recover money paid to defendant as an advance on a loan plaintiff was making to him and another, it is no defense that defendant had signed an order for the payment of the advance "out of the money to be loaned," and that the loan was never made, where it appears that the loan was abandoned because of the refusal of one of the applicants to indorse the note, there was nothing in the agreement to show that the money was not to be repaid if the loan was not made, and the defendant received the money.

CONTRACTS—CONSTRUCTION—LIABILITY. An applicant for a loan is liable on his agreement to pay the expense incurred in making it, although the loan was not completed, due to his failure to procure the abstract and complete the loan.

Appeal from a judgment of the superior court for King county, Everett Smith, J., entered November 30, 1912, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Gates & Emery, for appellant.

Beechler & Batchelor, for respondent.

MOUNT, J.—This action was brought by the plaintiff against the defendants, D. H. Lee and G. W. Lee and Anna Lee, his wife, to recover the sum of \$214, of which sum \$114 was advanced to the defendant D. H. Lee, and of which \$100 was claimed as expenses for a loan which the plaintiff agreed to make to the defendants. The cause was tried to the court without a jury, and resulted in a judgment in favor of the plaintiff and against the defendant D. H. Lee in the sum of \$179. The action as to the defendants G. W. Lee and Anna Lee, his wife, was dismissed. The defendant D. H. Lee has appealed.

It appears from the evidence in the case that the appellant, D. H. Lee, and one A. T. Thomas applied to the respondent,

¹Reported in 134 Pac. 508.

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in December, 1911, for a loan of \$1,000. These parties represented to the respondent that the loan would be secured by a real estate mortgage on property belonging to G. W. and Anna Lee. At the time the application for the loan was made, Mr. Knuppenberg introduced the parties to his attorney, who informed the applicants that it would be necessary for them to prepare a written application for the loan; that it would be necessary for them to agree to pay the expenses of obtaining the loan, which would be the attorney's fee for services, the expenses of an abstract of title, and the recording of the mortgage, which was estimated at about \$100. A written application was thereupon made. A note and mortgage were prepared and sent east to G. W. Lee and wife, to be executed. The mortgage was subsequently executed and returned to a bank in Seattle, where it was held subject to be delivered to the respondent upon the deposit of one thousand dollars to the credit of G. W. Lee and wife. In the meantime, D. H. Lee desired an advance of \$114, to be deducted from the \$1,000 when the note and mortgage should be returned. The money was advanced to A. T. Thomas and D. H. Lee. After the mortgage was returned, and after the \$114 had been advanced by Knuppenberg, the abstract of title was not completed and the loan was not made. The respondent thereafter brought this suit against the above named parties to recover the money advanced, \$114, and the expenses he had incurred in making the loan, which amounted to \$65. At the time the \$114 was advanced, A. T. Thomas and D. H. Lee signed a statement as follows:

"We hereby authorize Chester Batchelor to deliver \$114 to M. N. Knuppenberg out of the money to be loaned A. T. Thomas and D. H. Lee, or his brother."

It is argued by the appellant that D. H. Lee was not liable for the payment of this money unless the loan was completed, for the reason that it was an order for the payment of money out of a particular fund which never came into existence. But it is clear from the memorandum itself, and from all the facts

in the case, that the \$114 advanced by Knuppenberg was to be paid even though the loan was not made. It simply authorized Mr. Knuppenberg, or his attorney, Mr. Batchelor, to retain that amount of money out of the sum which was to be loaned to the defendants. The fact that the money was not loaned did not relieve the defendants from repaying the amount advanced. There is nothing in the agreement or in the evidence to show that the \$114 was not to be repaid in case the loan was not made. The appellant, D. H. Lee, having received the money, was liable to repay the same to the respondent.

It is also argued that the appellant, D. H. Lee, was not liable for the expenses of obtaining the loan which was not made. The loan was abandoned by the defendants for the reason that A. T. Thomas would not indorse the note when it was received. There is some dispute in the evidence upon the question whether D. H. Lee agreed to pay the expenses of the loan. But we are satisfied from a preponderance of the evidence that he did so agree. The expenses were shown to amount to \$65.

The main questions presented upon the briefs, and the main questions at the trial of the case, were questions of fact. We are satisfied from a reading of the record that the court below correctly found in favor of the respondent for the sum of \$114, with interest advanced by Knuppenberg to D. H. Lee; and also for the expenses of obtaining the loan which was not completed by reason of the failure of D. H. Lee and his agent, A. T. Thomas, to procure the abstract and complete the loan as they had agreed. The expenses to Mr. Knuppenberg on this account amounted to \$65.

The judgment is therefore affirmed.

PARKER, GOSE, and CHADWICK, JJ., concur.

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Opinion Per Gose, J.

[No. 11096. Department One. August 8, 1913.]

*In the Matter of the Guardianship of the Persons and Estates
of CLYDE GUY SROUFE et al.*

NELLIE L. CLARK *et al.*, Respondents, v. ADRIAN H. SROUFE,
Appellant.¹

GUARDIAN AND WARD—SETTLEMENT AND DISCHARGE—VACATION—LIMITATIONS. Rem. & Bal. Code, § 464, limiting the time for the vacation of an order discharging a guardian for minors to one year after the minors arrive at full age, has no application, where an order discharging a guardian and settling his final account was entered without notice to, or knowledge of, his ward, there was no actual settlement, and he continued to hold himself out as guardian; since the order is *ex parte* and void for want of jurisdiction, and may be vacated at any time.

GUARDIAN AND WARD—SETTLEMENT. Under Rem. & Bal. Code, § 1636, a guardian must fully account for and pay over all the ward's estate at the expiration of the trust.

APPEAL—REVIEW—EXCEPTIONS. Error in vacating the discharge of a guardian and ordering a settlement cannot be reviewed on appeal, where oral evidence was taken and the same was not brought up by bill of exceptions or statement of facts.

Appeal from a judgment of the superior court for King county, Frater, J., entered January 11, 1911, vacating the discharge of a guardian and settling his account. Affirmed.

L. H. Wheeler, for appellant.

Mitchell & Lawrence, for respondents.

Gose, J.—This is an appeal from an order entered in a guardianship proceeding, vacating a former order discharging a guardian and settling his account. The record is lengthy and somewhat involved. The following, however, are the essential facts:

On the 4th day of June, 1900, the appellant, Adrian H. Sroufe, was appointed guardian of the persons and estates

¹Reported in 134 Pac. 471.

of Clyde Guy Sroufe, Minnie Elizabeth Sroufe, and Nellie Lea Sroufe, minors, they being respectively his nephew and nieces in blood. On the 8th day of August, 1908, the guardian filed a petition, accompanied with the receipts or acquittances of Minnie Elizabeth and Nellie Lea Sroufe. The petition set forth that the minors had reached their majority, that he had paid to each thereof the amount due, and that he had obtained from each thereof a complete discharge and release. On August 14th, an order was entered in pursuance of this petition discharging the guardian and exonerating his sureties. The order recites that it appeared to the court that each of the minors was of lawful age; that, since each thereof had reached the age of majority, the guardian had entered into—"satisfaction of all claims and demands by them or either of them against him, and has paid to each thereof the sum of \$1,300 in full settlement of all claims and demands," and, "that his said accounts and payments in all respects are hereby approved."

On the 31st day of October, 1910, Nellie Lea Clark, formerly Sroufe, filed a petition in the guardianship proceedings. The object sought to be accomplished was to have the order of settlement vacated and to require the guardian to account. In her petition she alleged, among other things, that she was not of age at the time the guardian was discharged; that she became of age thereafter on the 21st day of October, 1908; that the guardian induced her to execute a release by representing that her share in her father's estate was only \$1,300 when it was considerably in excess of that sum; that this money was on deposit in a certain bank; that it was necessary for her to sign the release in order that the guardian might pay the same to her; that he did not pay said sum or any part thereof to her except \$40, which was paid on September 24th, 1910; that she did not join in the petition for a discharge; that she was not served with notice of the petition, either personally or otherwise, and that she had no knowledge of the filing of the petition or of the entry of the order,

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until about the 27th day of September, 1910. She further charged that he assumed to and continued to act as the guardian of her estate until the 25th day of October, 1910. Before the hearing she filed the affidavits of her brother and sister, Clyde and Minnie, corroborating the charges.

On the filing of the petition, the court entered a show cause order, requiring the guardian to appear on the 14th day of November, 1910, at a stated hour, to show cause why he should not be required to render to the court a full and true account and report touching his guardianship; why the order discharging him should not be vacated; why his bonds should not be reinstated; and why he should not be required to give additional bond. The guardian appeared and demurred to the petition and supporting affidavits on the ground of want of jurisdiction, insufficient facts, and that the petition had not been filed within the time limited by law. On January 11th, 1911, he served and filed his affidavit and answer whereby he put in issue all the material allegations of the petition of Nellie Lea Clark and the supporting affidavits. He pleaded affirmatively that the settlement with his ward was made in good faith, after a full adjustment of the accounts, and that she "fully ratified the said settlement by signed receipts . . . and by executing a deed whereby she conveyed her interest to the property in Kitsap county." On the same day the court entered an order vacating the order theretofore entered discharging the guardian, reinstated his bond, and directed him to give an additional bond in the sum of \$6,000. This order further required the appellant to render a full, true and correct report and account within the time fixed in the order.

Thereafter and on the 6th day of November, 1911, the court issued a second citation to the appellant, requiring him to appear on the 20th day of November following, at an hour stated in the citation, "then and there to render on oath a full, true and correct account of his receipts and of his ex-

penditures," touching the course of his guardianship. On December 11th following, the motion of appellant to quash the citation was overruled. On December 18th following, the appellant's default was entered. The order recites that,

"The court having heard and denied the motion of said Sroufe to quash the citation for said account on the 6th day of December, 1911, the said Sroufe being then and there represented by his attorney of record, L. H. Wheeler, and no account having been filed or served herein, and said Clark and said Whitney having in open court then and there moved the court for the default of the said Sroufe, and the court having then and there at the request of said Wheeler extended the time for filing an account herein until the hour of 9:30 a. m., on the 11th day of December, 1911. . . ."

The record shows that, on June 6th, 1912, two witnesses were sworn and testified in the proceeding and that the cause was continued to June 14th, when other witnesses were sworn and testified and certain documentary evidence was admitted. On June 29th, 1912, upon the testimony thus adduced, the court made and filed an account against the guardian. The order recites that it was made on the best evidence obtainable; that there had been no settlement between the appellant and his wards, and that Nellie Lea Clark became eighteen years of age on the 21st day of October, 1908. On the former date, June 29th, another citation was issued to the appellant commanding him to appear before the court at an hour stated on the 9th day of August, 1912, to show cause "why the final account of said guardian as made and filed by the said court should not be allowed and settled." The citation, together with a copy of the account found by the court and filed, was served on the appellant on the 2d day of July, 1912. The appellant answered this citation substantially as he had answered the original petition and affidavits, and pleaded affirmatively the bar of the proceedings by the one and two years statute of limitation. On the 23d day of August following, a final order was entered settling the account between the appellant and Nellie Lea Clark and Minnie

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Elizabeth Whitney, formerly Sroufe, she having in the meantime united in the petition of Nellie Lea Clark.

The first point pressed is that the court erred in overruling the appellant's demurrer to the petition and affidavits. It is argued that the case is controlled by the provisions of the code, Rem. & Bal. Code, § 464 (P. C. 81 § 1163), etc., and that both wards having arrived at full age more than one year before the petition was filed, the right of action was barred by statute. The argument overlooks the charges in the petition and affidavits, (a) that the order of settlement and discharge was made without notice to or the knowledge of the wards, and (b) that the guardian's account had neither been settled by the court nor between the guardian and his wards, and (c) that he continued to hold himself out as guardian of their respective estates until within a month before the initiation of these proceedings. The settlement and discharge were, therefore, *ex parte*, and determined nothing as between the guardian and his wards. *Lushington v. Seattle Auto & Driving Club*, 60 Wash. 546, 111 Pac. 785; *In re Sullivan's Estate*, 36 Wash. 217, 78 Pac. 945; *Boston Nat. Bank of Seattle v. Hammond*, 21 Wash. 158, 57 Pac. 365.

In the *Lushington* case, in speaking of the effect of a judgment entered without service or voluntary appearance, the court said:

"The right to vacate such judgments does not arise out of, nor does the procedure to secure the right depend upon, the statute. Rem. & Bal. Code, title 3, ch. 17. It is inherent in the court itself. It is no more nor less than the power possessed by every court to clear its record of judgments void for lack of jurisdiction. *Dane v. Daniel*, 28 Wash. 155, 68 Pac. 446."

The rule there announced is one of the fundamentals of the law, and applies to all hearings had without notice or a voluntary appearance in adversary proceedings. *Jorgenson v. Winter*, 69 Wash. 573, 125 Pac. 957. The court was therefore powerless to settle the guardian's account, and the

discharge affords him no protection. It is the duty of a guardian, at the expiration of his trust, to fully account for and pay over to the wards all the wards' estate remaining in his hands. Rem. & Bal. Code, § 1686 (P. C. 409 § 709).

The appellant in support of his demurrer has cited: *Bock v. Sanders*, 46 Wash. 462, 90 Pac. 597; *Peterson v. Lara*, 46 Wash. 448, 90 Pac. 596; *Meeker v. Mettler*, 50 Wash. 473, 97 Pac. 507. In the first two of these cases, it was held that, where there was a recital of due service of process in a judgment, the presumption of jurisdiction is not overcome by a defective record. In the *Meeker* case, the ward was present at the time the account was settled. The record of discharge in the case at bar is silent as to notice and the petition and affidavits charge that no notice was given.

The next errors assigned are, (1) that the court erred in vacating the order of discharge and in requiring the appellant to render an account, and (2) in entering a judgment against him. In the absence of a bill of exceptions or statement of facts—and there are none here—these questions are not open to appellant. *Hayworth v. McDonald*, 67 Wash. 496, 121 Pac. 984. The minute entries in the transcript show that parol evidence was taken.

A reference to our statement of the facts disclosed by the record will show that the appellant had ample opportunity to contest the questions of the validity of the settlement, whether the settlement was made with or without notice, and the validity of the discharge, and to participate in the accounting. Instead of meeting these questions, he chose to rely on the defense of the bar of the statute, and other defenses of a technical nature.

The judgment is affirmed.

MOUNT, PARKER, and CHADWICK, JJ., concur.

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[No. 11043. Department One. August 9, 1913.]

N. J. BENDON, *Respondent*, v. E. A. PARFIT *et al.*,
Appellants.¹

FRAUDS, STATUTE OF—ORAL SALE OF LAND—PART PERFORMANCE—POSSESSION AND IMPROVEMENTS. There is sufficient part performance of an oral contract for the sale of land to take the same out of the operation of the statute of frauds, where the purchaser took and retained possession with the consent of the vendor, and made permanent improvements consisting of a board house, shed, clearing and grading, enhancing the value of the property.

VENDOR AND PURCHASER—CONTRACT—PERFORMANCE BY VENDEE—ABANDONMENT. Abandonment by the vendee of a contract for land to be paid for by doing carpenter work, is not shown by the fact that the vendee returned an abstract of title on being unable to secure a loan to take advantage of a cash offer, where he had no such intention and held himself ready at all times to perform the services agreed upon.

SAME—PERFORMANCE OR BREACH—FORFEITURE—CONCURRENT ACTS. Vendors selling land in consideration of services to be rendered cannot put the vendee in default until they have offered to perform, the payment of the purchase price and delivery of the deed being concurrent acts.

SAME—BONA FIDE PURCHASERS—POSSESSION AS NOTICE. Actual possession of property by a vendee under an oral contract of sale, with knowledge that the vendee had made the improvements, imparts notice to a subsequent purchaser, who therefore is not an innocent purchaser.

Appeal from a judgment of the superior court for Kitsap county, McKenney, J., entered August 16, 1912, upon findings in favor of the plaintiff, in an action for equitable relief. Affirmed.

William C. Keith, for appellants.

Marion Garland and *Arthur C. McLane*, for respondent.

GOSE, J.—The plaintiff filed a bill in equity seeking two-fold relief, (a) to obtain a decree directing the cancellation

¹Reported in 134 Pac. 185.

of a deed executed by the defendants Parfit to their codefendants, and (b) to require the Parfits to specifically perform a parol contract for the conveyance of certain real property. The plaintiff prevailed in both aspects of the case, and all of the defendants have appealed.

The court found that the Parfits, about the 1st day of September, 1909, being the owners of lots 6 to 12, inclusive, block 10, of Sweeney's addition to the town of Port Orchard, entered into a parol contract with the respondent whereby it was agreed that they would sell the property to him for a consideration of \$350, to be paid by the respondent in carpenter work to be furnished by the vendors; that, in pursuance of the contract, the respondent performed carpenter work for them of the value of \$83, paid them \$5 in money, and has stood ready to complete his contract. The court further found that the respondent in the fall of 1909, in reliance upon the contract, took actual possession of the property, erected permanent improvements thereon of the value of \$700; that he has continued in the possession of the premises; that, on the 13th day of November, 1911, the Parfits conveyed the premises to their codefendants and that they took the deed with full knowledge of the respondent's rights. It further found that the balance of the purchase price was \$262, and that, in view of the fact that the Parfits had no work for the respondent, he should pay the balance in money. The decree ordered the cancellation of the deed from the Parfits to their codefendants, and directed specific performance of the contract upon the payment of the remainder of the purchase price in money.

The appellants make four principal contentions: (1) that the contract is within the statute of frauds; (2) that the respondent abandoned the contract; (3) that specific performance will not be decreed until there has been a complete performance by the party invoking the relief; and (4) that the Millers were innocent purchasers. These contentions will be considered in the order stated.

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The findings of the court to the effect that the respondent, in reliance upon the contract, took possession of the property in the fall of 1909, made permanent and valuable improvements thereon and continued in the possession thereafter, is fully sustained by the evidence. The record shows that he erected upon the property a board house 14x24 feet in dimensions and a "good sized" woodshed; that he did clearing and grading of the value of about \$200; that he raised a garden on the lots for two or three years; that he lived on the property the greater part of the time after taking possession, and that he at all times kept his household furniture and provisions in the house. The buildings were erected in the fall of 1909. The clearing, consisting of the removal of stumps and logs, and the grading were done in the years of 1910 and 1911. The possession was taken and held under the contract with the knowledge, consent and acquiescence of the vendors. The improvements were permanent in their nature and enhanced the value of the property.

We have uniformly held that such possession and improvements constitute a sufficient part performance to take the transaction out of the operation of the statute of frauds. *Mudgett v. Clay*, 5 Wash. 103, 31 Pac. 424; *Peck v. Stanfield*, 12 Wash. 101, 40 Pac. 635; *Borrow v. Borrow*, 34 Wash. 684, 76 Pac. 305.

The second contention, that the respondent abandoned the contract, is equally wanting in merit. The vendors offered him an abatement of \$20 on the purchase price if he would pay the balance in cash, and while he was endeavoring to raise the money, they conveyed the property to the Millers. They now maintain that he was unable to raise the money, and that because he returned an abstract of title which they had furnished him, he elected to abandon the transaction. He testified that he had no such intention, and we think all the circumstances of the case corroborate that view. The evidence shows, and the court found, that the respondent at all times held himself ready to perform his contract, i. e., to do the

work which he had agreed to do and which the vendors had agreed to furnish him. He asserted this fact in his bill and prayed for general relief. This was equivalent in equity to a tender. The decree is made subject to the payment of the balance of the purchase price in money. Of this the vendors may not justly complain. *Ankeny v. Clark*, 1 Wash. 549, 20 Pac. 583; *Colpe v. Lindblom*, 57 Wash. 106, 106 Pac. 634.

The vendors could not put the respondent in default until they had offered to perform. The payment of the purchase price and the delivery of the deed were to be concurrent acts. *Mudgett v. Clay*, *supra*. The vendors made no tender of performance.

Were the Millers innocent purchasers? We think not. The respondent had the actual possession of the property. This imparted notice of the extent of his rights to all the world. *Kuhl v. Lightle*, 29 Wash. 137, 69 Pac. 630. Moreover, the respondent had applied to Mr. Miller for a loan of money in order that he might take advantage of an offer of the vendors to abate \$20 of the purchase price, if he would pay in cash. Miller knew the purpose for which the loan was desired. He testified that the respondent said to him that he would lose the property if he did not succeed in borrowing the money. This the respondent denies. Mr. Miller when on the witness stand was asked:

"Q. You knew he [the respondent] had made improvements and had been living there? A. Yes, that is perfectly correct."

Under these facts, it seems futile to contend that he was an innocent purchaser.

The judgment is affirmed.

PARKER, MOUNT, and CHADWICK, JJ., concur.

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Opinion Per CHADWICK, J.

[No. 11249. Department One. August 9, 1913.]

THE STATE OF WASHINGTON, *on the Relation of William Maddaugh et al., Appellant, v. J. E. Ritter, as Mayor of the City of Republic, Respondent.*¹

INTOXICATING LIQUORS—LICENSE FEES—REFUND—MUNICIPAL CORPORATIONS—POWERS—MORAL OBLIGATION. A city council, upon cancelling a liquor license for no fault of the licensees, may refund the unearned portion of the license money, without express statutory authority, since it was a moral obligation which they could pay or compromise.

MANDAMUS — TO CITY OFFICERS — MINISTERIAL DUTIES — SIGNING WARRANT. Where the city council has, within its authority, allowed a claim, the mayor's duty to sign the warrant is ministerial, and mandamus lies to compel its performance.

Appeal from a judgment of the superior court for Ferry county, Pendergast, J., entered January 3, 1913, dismissing a proceeding in mandamus, after sustaining a demurrer to the petition. Reversed.

Samuel Porter and Charles P. Bennett, for appellant.

Frank M. Allyn, for respondent.

J. W. Faulkner, *amicus curiae*.

CHADWICK, J.—The relators were granted a license to sell liquor in the town of Republic. After they had engaged in business for some time, the license was transferred, with the formal consent of the city council, to one Foley. Foley was thereafter prosecuted and convicted of the crime of selling liquor without a license, the court evidently holding that the transferred license was void for the reason that relators were not citizens of the United States at the time it was issued. Rem. & Bal. Code, § 6297 (P. C. 267 § 39). Thereupon the plaintiffs asked the city council to rebate or refund a part of the unearned license fee, the said Foley having relinquished

¹Reported in 134 Pac. 492.

his rights if any, in favor of relators. The council allowed the claim to the extent of \$225, and ordered a warrant drawn therefor. Respondent, who is mayor of the city, refused to sign the warrant, whereupon, relators petitioned the court for a writ of mandamus. A demurrer to the petition was sustained, relators refused to plead further; and this appeal is prosecuted from a judgment of dismissal.

There is something in the briefs suggesting the bad faith of the relators. We find nothing in the complaint, which is admitted to be true on demurrer, to warrant us in so holding or in discussing the case upon that theory. On the contrary, we are bound to hold, upon the record before us, that the relators as well as the council have proceeded in the utmost good faith and with no wilful intent to violate the law. The licensees proceeded to do business until the license was held to be void by the court. Thereupon, they ceased to do business. The holding that the license was void was not grounded upon any act of misconduct in the operation of the business, but solely because the relators were not citizens of the United States. It is contended, under this state of facts, that relators cannot compel the signing of a warrant which has been drawn under a formal order of the council.

Let us assume—in principle it will be the same case—that, after the licensees had operated for a part of the term, the city council had discovered that they were not qualified to hold a license, because they were not citizens of the United States, and had notified them to come in and surrender the license. Waiving the question of what the city can be compelled to do, can there be any question of what it should do? In the absence of a controlling statute, the public should observe the same rules of conduct as it insists upon in the citizen when dealing with his fellows. The same obligation to do justice rests upon it as rests upon an individual. If the city can be estopped—and it can be in cases where it has original power to act (*Green v. Okanogan County*, 60 Wash. 309, 111 Pac. 226; *Franklin County v. Carstens*, 68 Wash. 176, 122 Pac.

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999; *Criswell v. Directors School District No. 24*, 34 Wash. 420, 75 Pac. 984; *Coliseum Inv. Co. v. King County*, 72 Wash. 687, 131 Pac. 245)—it can formally waive a legal right where the claim is doubtful, or in obedience to the demands of equity and justice. While the authorities are endless and in hopeless confusion upon the subject of rebate of liquor license taxes, the courts have generally, being otherwise free to act, applied the doctrine of justice and right as between man and man. *Lydick v. Korner*, 15 Neb. 500, 20 N. W. 26; *Martel v. East St. Louis*, 94 Ill. 67; *People ex rel. Thomas v. Sackett*, 15 App. Div. 290, 44 N. Y. Supp. 593.

The council has power to audit and allow claims. It has an inherent power (28 Cyc. 1752), to compromise claims.

“The city by its legislative body has admitted the justice of that claim and that it of right ought to be paid, though the relator, for technical, rather than for substantial, reasons, could not collect the same from the city by an action, . . . Under this state of facts we think that the board of legislation might legally pass an ordinance directing the payment thereof, . . . and make it obligatory upon the officers of the corporation to carry out its provisions.” *State ex rel. Kessler v. Brown*, 4 Ohio Cir. Dec. 345.

“It is in the power of towns to settle claims which may be made upon them arising out of their administration of their municipal affairs. A vote to appropriate money for such a purpose is therefore binding upon them, even if upon subsequent examination it is ascertained that the claim which was to be settled thereby was one which could not have been successfully maintained.” *Matthews v. Westborough*, 131 Mass. 521.

See, also, *Bailey v. Sherry*, 3 Pa. Dist. 543.

It is true that there is no statutory warrant for such repayment, nor is any necessary. The right is founded in the doctrine of common honesty. *Lydick v. Korner*, *supra*. Such repayment might not be compelled (that question is not before us) but the council may, if it sees fit, return any money which has been paid under a mistake of law or of fact, and to which it has no moral claim. *Pimental v. San Francisco*, 21

Cal. 352; *Soderberg v. King County*, 15 Wash. 194, 45 Pac. 785, 55 Am. St. 878, 33 L. R. A. 670.

We do not have to go beyond the decisions of our own court to sustain our conclusions. In *Pearson v. Seattle*, 14 Wash. 438, 44 Pac. 884, it is said:

“Appellant also contends that a license issued by a city is a mere permit or privilege to engage in a specified business and does not create any contractual relation or obligation between the city and the licensee, and is revocable at the discretion of the municipality, and that there is therefore no obligation on the part of the city to refund the whole or any part of the money paid for such privilege. Conceding that the city, in the exercise of its police power, had a right to revoke respondent's license, as it did virtually revoke it by Ordinance No. 3152, yet it does not follow that it has a right to retain the money received for a license for a time during which such license was rendered valueless by its own act. The respondent paid his money for a consideration which he has, in part, failed to receive, by reason of the act of the city. On the other hand, the city has received money for the granting of a privilege which it has repudiated and annulled. It is, therefore, in justice and equity, bound to repay it.”

We have not overlooked counsel's insistence that the complaint is defective in that it does not allege that the license was void, or that the relators are aliens, or that they have surrendered their license, or that they did not operate their saloon until the limit of the license. We have examined the complaint carefully and are satisfied that it states a cause of action. There was no motion to make it more definite and certain. The merit of the case has been discussed, and it would be idle to prolong this piece of litigation by holding the complaint technically insufficient.

The claim having been allowed by the council, respondent is without discretion to refuse to sign the warrant. His duty is ministerial. Rem. & Bal. Code, § 7867 (P. C. 77 § 503); *State ex rel. McCormick v. Fisher*, 5 Pen. (Del.) 273, 64 Atl. 68; *State ex rel. Minneapolis Tribune Co. v. Ames*,

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Syllabus.

81 Minn. 440, 18 N. W. 277; *People ex rel. Tucker v. Opdyke*, 40 Barb. 806.

The case will be remanded with instructions to issue the writ prayed for.

GOSE, PARKER, and MOUNT, JJ., concur.

[No. 11050. Department One. August 11, 1913.]

WASHINGTON FINANCE CORPORATION, *Appellant*, v. R. E. GLASS *et al.*, *Respondents*.¹

ALTERATION OF INSTRUMENTS — MATERIALITY — BILLS AND NOTES — INDORSEMENTS — REDUCTION OF AMOUNT. The indorsement upon the back of a note, offered for discount to a bank, of a fictitious payment, reducing the amount of the principal sum, as a condition precedent to discount or delivery to the original payee, without the knowledge of an accommodation maker, is a material alteration, within the negotiable instruments act, Rem. & Bal. Code, §§ 3514, 3515, providing that a promissory note is avoided by a material alteration without consent of all the parties, and that any alteration is material which changes . . . the sum payable . . . or which alters the effect of the instrument in any respect; and it is immaterial that the change was to the advantage of the maker.

SAME — TIME OF ALTERATION — BILLS AND NOTES — EXECUTION. An indorsement of a fictitious payment on the back of a note offered for discount, reducing the amount of the principal sum, as a condition precedent to discount or negotiation, is not made after "execution" of the note, and is therefore a material alteration, although the note had been signed, since it had not been delivered, and execution requires both signature and delivery of a note meeting all the requirements of the negotiable instruments act, Rem. & Bal. Code, § 3392.

BILLS AND NOTES — BONA FIDE PURCHASERS — HOLDER IN DUE COURSE — ACTUAL NOTICE — PARTICIPATION IN ALTERATION. A bank to whom a note was offered for discount, is not a holder in due course without notice of a material alteration, within the negotiable instruments act, Rem. & Bal. Code, § 3514, where it was a party to and participated in the alteration by insisting upon the indorsement of a fictitious payment reducing the principal sum, as a condition to acceptance and discount.

¹Reported in 134 Pac. 480.

Appeal from a judgment of the superior court for King county, Main, J., entered August 5, 1912, upon findings in favor of the defendants, in an action upon a promissory note, tried to the court. Affirmed.

Bogle, Graves, Merritt & Bogle, for appellant.

W. W. Felger, for respondents Stokes.

CHADWICK, J.—Defendant Glass solicited the defendants Stokes and wife to join him and his wife as makers of a promissory note for the sum of \$15,000. Stokes and wife agreed to do so upon condition that he would secure the signatures of W. A. Ridgway and wife and William Housten and wife. This, Glass agreed to do, and the note was accordingly signed by Stokes and wife. No effort was made, so far as the record shows, to secure the other names. The note was turned over to Ridgway to negotiate for the benefit of Glass.

At the time the note was executed, it was not known where or of whom the money could be obtained, and the space provided for the name of the payee was left blank. Ridgway took the note to the Spokane & Eastern Trust Company, at Spokane, and endeavored to obtain a loan in the sum of \$15,000. At first the negotiations hung on the question of discount, the bank demanding the sum of \$1,000. For reasons which, to the bank, seemed sufficient, coupled with the possible reason that Ridgway refused to guarantee the loan for more than \$11,000, the bank finally refused to loan more than \$11,000, subject to a discount in the same proportion, or eleven-fifteenths of \$1,000. The bank then filled in the name of Ridgway as payee, and had him indorse the note in blank, and took a personal guarantee of its payment. It then paid him the sum of \$10,240.14, being \$11,000, less the agreed discount. To make the note conform to the contract made with Ridgway, the bank indorsed a payment of \$4,000 on the back of the note. Ridgway paid the proceeds of the note to Glass.

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The defendants Stokes and wife have never ratified the changes made in their contract. The note was not paid when due, and this suit was brought to compel payment. The defendants Stokes and wife have set up several defenses, only one of which will be noticed by us, i. e., a material alteration.

The court found that there was a material alteration of the note, and defendants Stokes and wife were absolved of all liability. A judgment was rendered in their favor. Plaintiff has appealed.

It is the contention of the appellant that the judgment is ill founded in law for the reasons that the alteration is not material in that it reduced the amount to be paid, and was therefore for the benefit of the makers; that an indorsement of a payment on the back of an instrument is not an alteration within the meaning of the statute; and that the alteration, if any, was made before the note was executed, and hence is not within the prohibition of the negotiable instruments act. The act provides:

“Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.” Rem. & Bal. Code, § 3514 (P. C. 357 § 247).

“Any alteration which changes—

- “(1) The date;
- “(2) The sum payable, either for principal or interest;
- “(3) The time or place of payment;
- “(4) The number or the relations of the parties;
- “(5) The medium or currency in which payment is to be made;

“Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.” Rem. & Bal. Code, § 3515 (P. C. 357 § 249).

We had occasion to discuss these sections in the case of *Handsaker v. Pedersen*, 71 Wash. 218, 128 Pac. 230. There, as here, the instrument did not find favor in the current of trade, and to meet the demands of the bank to which the note was offered, other names were added as makers. We held this to be a material alteration within the meaning of the statute. It was insisted that Pedersen should not be heard to make the defense of material alteration, for the reason that the change was for his benefit in that the addition of other names as makers tended to reduce *pro tanto* his primary liability. We contented ourselves with quoting the statute, which seemed too plain for discussion, and by reference to Daniel on Negotiable Instruments, § 1375 and § 1387.

Whatever comfort may be extracted from the older authorities, we are quite clear that it was the purpose of the negotiable instruments act to avoid and make impossible just such situations as is presented in this case. There was a purpose in the adoption of the negotiable instruments act, declared in the propaganda which preceded its adoption, and manifested in the act itself; that is, that all cases arising under it should, if possible, be decided by reference to it, and not by reference to any equities existing between the parties. It may be in a given case that an indorsement of a payment would be for the benefit of a surety or an accommodation maker. In another case it might work his destruction. So too, the addition of another name as a maker, or the extension of the time of payment would theoretically be for the benefit of the surety or accommodation maker, but the law regards not the purpose or the effect of the change. *Handsaker v. Pedersen*, *supra*; Daniel, Negotiable Instruments, § 1375. It is enough that, whether advantageous or not, the change results in a contract upon which the minds of all parties have not met. *Wood v. Steele*, 6 Wall. 80. The statute cannot be read in any other way. Therefore, in order to avoid such contingencies, the negotiable instruments act was drawn, and when adopted displaces the Law Merchant,

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which had become, through the mediumship of hard cases, saturated with permissible causes of action and defenses of an equitable nature. In his first criticism of the proposed law (14 Harvard Law Review 241) Professor Ames, Dean of the Harvard Law School, admits this virtue. "Especially to be commended are those sections of the new code which settle, and in a right way, certain questions which have been a prolific source of litigation and antagonistic decisions." See generally the reprint of Ames-Brewster controversy, Brannan, Negotiable Instruments Law (2d ed.), p. 162 *et seq.*

There is no ambiguity or doubt in the statute we have quoted. It says a change of the sum payable is a material alteration; and to put its intent beyond the cavil of a doubt, it was provided that any "change or addition which alters the effect of the instrument in any respect is a material alteration." This view makes it unnecessary to go beyond the statute, or to discuss the many admittedly conflicting authorities on alterations of instruments under the Law Merchant.

But it is said that an indorsement of a payment on the back of an instrument is not a material alteration; that the statute is intended to cover only such changes as touch the face of the instrument. Whether an indorsement made in good faith after the instrument has been given currency would be a material alteration, we are not called upon to decide. We are quite clear, however, that the indorsement of a fictitious payment as a condition precedent to the acceptance, negotiation, discount, or delivery of a note to the original payee or lender of the money, changes "the effect of the instrument," as well as the sum payable, and is an act proscribed by the statute. It must be borne in mind that the bank never intended to loan \$15,000. It did not loan \$15,000. No money was paid in excess of \$10,240.14, nor was any sum actually paid in good faith, or at all, to be indorsed on the note. The whole transaction, in so far as the contract pretends to deal with any sum in excess of \$10,240.14, is a fabrication. There are reasons for holding a fictitious pay-

ment to be a material alteration. All of them are referable to the principle that a person has a right to make his own contracts. The law, as we now have it, was not drawn solely with reference to the right of the payee of a note. There is nothing sacred in a contract drawn in the form of a promissory note. A payee or holder is not permitted to recover on his part of a contract alone, nor can he insist that the law make a contract for him, or the other contracting party. He must recover upon the contract made by his adversary, and if the instrument has been so changed that it does not voice the original will of the maker, there can be no recovery. A case in point is that of *Johnston v. May*, 76 Ind. 293. There had been an indorsement of a fictitious credit. The court said:

"We need not argue for the purpose of showing that such an alteration of the note was a material alteration, for that is manifest; and the facts found by the court show that this alteration was made in the absence and without the authority of the appellee, and without his knowledge or consent, by the principal in the note and the payee thereof, or one of them, before or at the time of its delivery. Under the decisions of this court, such an alteration will vitiate and avoid the note, and prevent a recovery thereon from the appellee. *Holland v. Hatch*, 11 Ind. 497; *Schnewind v. Hacket*, 54 Ind. 248; *Collier v. Waugh*, 64 Ind. 456; *McCoy v. Lockwood*, 71 Ind. 319; *Dietz v. Harder*, 72 Ind. 208. It may be said, however, that the effect of the alteration of the note, in this case, was to reduce its amount and diminish the appellee's liability, and therefore he ought not to be heard to complain of such an alteration. In the case of *Coburn v. Webb*, 56 Ind. 96, the effect of the alteration of the note in suit was the same as in the case now before us, to diminish the amount of the surety's liability, and the same point seems to have been made in that case as the one now under consideration. Upon that point, in the case cited, this court said: 'This change of the note did not, perhaps, operate to the prejudice of Coburn. But that is not the legal criterion by which to determine whether an alteration of a note destroys it. The question is, is the note sued upon the same note, in legal effect, as that signed by Coburn? If the alteration made the note a different one in

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legal effect, then it is not Coburn's note, and he is not bound by it. These views are fully sustained by the current of authorities in this state and elsewhere.' "

This case meets the first two propositions advanced by counsel, and we can safely rest our decision of them upon it and the *Handsaker* case and the authorities therein cited. We have not overlooked the insistence of counsel that the Indiana case is substantially overruled in later cases, but we do not so read the books. In *Meeker v. Shanks*, 112 Ind. 207, 13 N. E. 712, it was held that the name of the payee might be changed without avoiding the contract of an accommodation maker, on the theory that "it was immaterial to the surety who advanced the money, so that the person for whose accommodation he signed obtained the benefit of it." It is enough to say that the alteration here complained of was not discussed. The authority of *Johnston v. May* was not denied. *Holthouse v. State ex rel. Ludlow Falls Quarry Co.* (Ind. App.), 97 N. E. 130, was a case on a contractor's bond, and was decided with reference to the general rules of the law. The negotiable instruments act was in no way involved. It was not relied on by counsel or considered by the court. The case of *Merchants' & Mechanics' Bank v. Evans*, 9 W. Va. 373, should be mentioned. This case is seemingly in point, and is relied on by appellant. A note for \$6,000 was signed by seven people, one of whom was the principal maker. The bank discounted the paper for \$4,000 only, and the cashier indorsed upon it at the time, "discounted for \$4,000, and should be so read." Upon suit brought it was held that, "The original transaction, in its legal effect, amounted to a loan of \$6,000, to all the makers of the note, and a payment thereon forthwith, of \$2,000, which, in effect, was credited at the time upon the note by the indorsement, which the cashier at once made upon it." And, "the fact that four thousand dollars only, instead of six thousand dollars, was loaned without the consent of some of the makers of the note, who were sureties, does not vitiate the note; for the party who received

the money, had he received in cash the \$6,000, would have had a perfect right, without the consent of his sureties, to have paid back at once \$2,000 to the bank." This case stands alone so far as we have been able to trace the decisions. It is not cited or commented on by any of the prominent text writers. In our judgment, it is not sound when applied to the state of facts there occurring. We have no doubt that an actual *bona fide* transaction would be upheld by any court. It was not so in that case, neither is it so in this. In the instant case, if the bank took the paper at its face, and Glass, for whose benefit the note was discounted, had thereafter found that he did not need the full \$15,000 and had repaid the \$4,000, there could be no doubt of the right to recover. There would have been a loan and a repayment. The case shows no such state of facts. The payment, if it can be so called, was a fiction. The fault of the West Virginia case lies in this: the court assumes that the legal effect of the transaction amounted to a loan of \$6,000 and a payment forthwith of \$2,000. This is not true. There can be no loan without credit. The makers of the note never had credit for the \$6,000. Therefore, there could not be a loan of \$6,000 and a payment of \$2,000. The object of the note in the present case was to establish a credit for \$15,000. If it were not so, respondents might not have signed the note. No such credit was ever established. Whether a transaction of the kind occurring in the two cases is a material alteration depends upon its faith. If the transaction is real and based upon the full credit of the note, it is not a material alteration; if the credit is simulated and the indorsement of a payment is a subterfuge, it is.

It is next contended that the indorsement was made after the execution of the note, and, therefore, forms no part of it. 1 Randolph on Commercial Paper, pp. 300, 301; Daniel on Negotiable Instruments, § 1396; 7 Cyc. 629; and many cases are cited to sustain the proffered issue. Counsel for respondents has cited cases to sustain the contrary of this doctrine. No

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purpose will be served by reviewing and distinguishing these cases. Counsel for appellant indulges in a learned argument, but it seems to us that they admit their case away when they say:

"It is true that words on the back of a note made *at the time of* or *prior* to the *execution* of said note, if they in any way affect the operation of the note, are considered as a material part of the note, and that an alteration of such words would be a material alteration, and that the writing of an endorsement on the back of a note, if made *contemporaneous* with the note, is considered as a part of the note; but an endorsement made subsequent to the execution of the note is not considered as a part of the note itself."

The real question confronting the court is: When was the note executed? A note is distinguished by its parts and particular requisites. It must be in writing, and signed by the maker or drawer; it must be an unconditional promise to pay a sum certain; and it must be payable to order or bearer. There are certain other requisites not now necessary to enumerate. Rem. & Bal. Code, § 3392 (P. C. 357 § 1).

Keeping this section of the statute in mind, it is the law that, until a note meets these requirements, it is not executed. A note is executed when it is complete in its parts, and launched on the current of trade. The note sued on, although signed by certain parties, and in this sense executed by them, was not an executed instrument within the meaning of the law. It was not ready for delivery, nor was it delivered, until the name of the payee was inserted and the indorsement made.

"Execution of a note requires both a signature and delivery. In a legal sense the word execute includes delivery and implies a complete contract." Words and Phrases, Title "Execute."

See, also, *Nicholson v. Combs*, 90 Ind. 515, 46 Am. Rep. 229; *Bagley v. McMickle*, 9 Cal. 430.

The bank refused to accept or discount the note until the fictitious payment was indorsed upon it. As the note was ad-

mittedly indorsed before delivery, and delivery being an essential element of execution, it follows that the change was made before execution, and is therefore material. Daniel, *Negotiable Instruments*, § 1396. We are not called upon to decide what the legal effect of an indorsement after execution would be.

Neither can the plaintiff recover under the provisions of the negotiable instruments act, wherein it is provided that, when an instrument has been materially altered and is in the hands of a holder in due course not a party to the alteration, he may enforce payment thereof according to its original tenor. Rem. & Bal. Code, § 3514 (P. C. § 247). The Spokane & Eastern Trust Company was not a holder in due course. *First Nat. Bank v. Barnum*, 160 Fed. 245. The bank had notice of the infirmity. It was a party to, and participated in, the act of alteration. Other defenses are urged, but being satisfied that no recovery can be had, for the reasons stated, we will not pursue our inquiry further.

Affirmed.

CROW, C. J., GOSE, MOUNT, and PARKER, JJ., concur.

[No. 10421. Department One. August 11, 1913.]

INTERNATIONAL CONTRACT COMPANY, *Appellant*, v. THE
CITY OF SEATTLE, *Respondent*.¹

MUNICIPAL CORPORATIONS—CLAIMS—PRESENTATION—NECESSITY. Seattle charter, art. 4, § 29, requiring "all claims for damages" to be filed, as a condition precedent to action, includes claims for damages arising out of breach of contract when proof of damages independent of the contract must be made; notwithstanding that other portions of the section respecting the details of the notice are applicable only to claims for personal injuries.

SAME—TIME FOR FILING—ACCRUAL OF DAMAGES. Under Seattle charter, art. 4, § 29, requiring all claims for damages to be filed with-

¹Reported in 134 Pac. 502.

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in thirty days after the damages accrue, the time for filing a claim for breach of contract does not begin to run from the date of a refusal to pay damages, but from the time of the actual accrual thereof.

Appeal from a judgment of the superior court for King county, Ronald, J., entered February 3, 1912, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Preston & Thorgrimson, for appellant.

James E. Bradford and *Howard M. Findley*, for respondent.

ON REHEARING.

PER CURIAM.—The court has reconsidered the question discussed in the original opinion, 69 Wash. 390, 125 Pac. 152.

In the petition for rehearing it is insisted that the case of *Sheafe v. Seattle*, 18 Wash. 298, 51 Pac. 385, is controlling. That case as well as the case of *German-American Sav. Bank v. Spokane*, 17 Wash. 315, 49 Pac. 542, 38 L. R. A. 259, was overruled in *Jurey v. Seattle*, 50 Wash. 272, 97 Pac. 107. In the *Jurey* case and in *Postel v. Seattle*, 41 Wash. 432, 83 Pac. 1025, the court refused to qualify the words of the charter, "all claims for damages." Seattle Charter, art. 4, § 29.

Notwithstanding the able argument made to sustain the proposition that the charter was intended to and does apply to actions of tort only, we think that it would be an unwarranted departure from accepted rules of construction to so hold. Actions for damages may arise *ex contractu* as well as *ex delicto*, and the phrase "all claims for damages" is sufficiently comprehensive to include such claims, whatever their origin. There is a difference between an action on contract and a claim for damages arising out of a breach of a contract. In the instant case, the suit is not upon contract, but is independent of it. The test is, whether the proof of the contract and a breach thereof would make out a *prima facie*

case. If so, no claim need be filed. If proof of damages independent of the contract must be made, the case falls within the words of the charter, and must fail if the claim is not presented. Courts should not write exceptions into the statute law where the legislative body has not.

It is said that the words "*All such* claims for damages must accurately locate and describe the defect that caused the injury, accurately describe the injury. . . ." indicate a purpose to limit the conditions there imposed to personal injury cases. This argument was met in the *Postel* case, where it is said:

"True, other portions of the section would seem to be more appropriate to claims of another character than this, but this cannot be held to do away with the general requirement. In presenting claims, the details provided by the charter provision need only be followed in so far as they are applicable to the particular claim, but the general provision requiring claims for damages to be presented is applicable to all claims, and can be followed in every instance."

One question that was raised and not discussed at the former hearing is that, if it be held that it was necessary to file a claim, it was in fact filed. More than thirty days after the alleged damages had accrued, the city paid the amount due on the contract, and, as it is alleged, refused to pay the claim for damages. Within fifteen days thereafter, a claim for damages was filed. It is contended that the city did not suffer any loss or inconvenience by reason of the fact that no claim was filed, and that a claim should not properly be filed until the city had refused to pay damages for its breach of the contract. The fault with this reasoning is that the charter provides, in terms, that a claim must be filed within thirty days after the damages have accrued; and further, because the city is not bound to act until a formal claim has been presented. It may be that the refusal of the city to pay the damages was because no claim had been presented. If counsels' reasoning be good, a demand and refusal in such cases

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would start the special statute of limitations, or the charter limitation as in this case, to running anew, irrespective of the time the damages accrued.

Neither does it follow that a claim must be filed for every breach and in all cases. It may be so as a general proposition, but if the damages are of such nature that they may be called continuing, a claim filed even before all the damages have been suffered, if in form to cover prospective damages, has been held sufficient to satisfy the law. *Hieber v. Spokane*, 73 Wash. 122, 131 Pac. 478.

The majority of the court adheres to its former holding. The judgment is affirmed.

[No. 10442. Department One. August 11, 1913.]

ANNA W. SPUTE, *Appellant*, v. ANDREW J. SPUTE,
Respondent.¹

DIVORCE—GROUNDS—RENDERING LIFE BURDENSOME—EVIDENCE—SUFFICIENCY. Under Rem. & Bal. Code, § 982, authorizing a divorce on any grounds deemed sufficient, where the court is satisfied that the parties can no longer live together, the denial of a divorce is unwarranted, where it appears that there is no love between the parties, the defendant's attitude toward his wife has been such as to make her life burdensome, and the parties agree that they can no longer live together, although there was no evidence of quarrels or temper or actual abusive treatment (MOUNT, J., dissenting).

DIVORCE—ALIMONY—RIGHT TO. The wife is entitled to alimony although all the property belonged to the husband at the time of the marriage.

Appeal from a judgment of the superior court for Kitsap county, Yakey, J., entered March 18, 1912, dismissing an action for a divorce, after a trial on the merits to the court. Reversed.

Saunders & Nelson, for appellant.

Gill, Hoyt & Frye, for respondent.

¹Reported in 134 Pac. 175.

CHADWICK, J.—Plaintiff and defendant were married at Denver, Colorado, in June, 1906. Plaintiff was twenty-one years old and defendant forty-two. Defendant had been married before. He had some mining property or prospects in Alaska, and the parties went to Nome, where they remained two seasons. In Alaska their life was harmonious. In 1908, they came to Seattle, and after a time spent at a hotel, defendant bought a small farm in Kitsap county. They then removed to the farm and raised fruit and chickens and other products of a small place. Defendant cleared up some of the uncleared land, which involved some extra work to the housekeeper. The work about the farm and household was about the same as that done by the small farmer and his family in the Puget Sound country. Plaintiff makes some objection to the burden of her work, but the objection goes not so much to the character or kind of work as to the fact that there was no sympathy between the parties and no approbation of her efforts, a thing which oftentimes lightens the burdens of both men and women. She says she liked the farm, and but for what she terms the cruelty of the defendant, would have been satisfied and content. The testimony shows throughout that plaintiff was unhappy and often in tears. She says defendant was abusive and cross, and at times called her names; that he objected to her having company; and it is not denied that, during the whole time she was on the farm, he did not take her to visit any of the neighbors. The last year the parties lived on the farm, they did not live together as man and wife. Of his conduct, the several witnesses say:

“A. Very abusive, he abused her all the time I was there. . . . He was always very cross and called her names and made her feel bad every day, and several times she cried and would go away from the table, and he would make remarks to her. . . . Q. Did you notice Mr. Spute’s conduct towards her and any effect it had on her, please state what. A. I don’t know exactly how to answer that question. I never knew of him particularly abusing her, at the same time I never knew of him treating her kindly, he was always cross

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and bluffing. I never knew him all the time I was around there as far as I can remember ever speaking kind words to the woman, never. Once I heard him scold her; I went down there to get some money and he went to get a pen and couldn't find it. He laid it away and blamed her and scolded her quite severely for it; that is the only time I ever heard him come right out and scold her. . . . No, not absolutely cruel, he is a nervous man and speaks up quickly, and if any one would call that cruel, that is the way I would put it. . . . And seen her other times when he was around and she would break down in tears. . . . At times Mr. Spute seemed to be nervous and cross and in a hurry."

The only witness who testifies to the question says that there was no quarreling between them, although he had seen "others get on better." Other neighbors say:

"Q. As far as seeing Mr. and Mrs. Spute together under social contact, you and Mrs. A. never really saw them together in that way? A. I do not know as we ever did. Q. Did you ever have occasion to know the conduct of Mr. Spute towards his wife? A. I never saw them together but once."

Plaintiff seems to have been an excellent housekeeper and a home-loving woman. Defendant was industrious and ambitious to make money. No aspersion of the character of either party can be found in the testimony. Plaintiff left her home on October 24, 1910, and went to Seattle, where she worked at the millinery trade and has since engaged in domestic service. On October 31, 1910, plaintiff wrote the letter which follows. We quote it in full because of the construction put upon it by counsel for the defendant and by the trial judge.

"Seattle, Wash., Oct. 31st, 1910.

"Dear Husband: Will write you a few lines to let you know if you should come in Saturday I suppose you will not find me at home. I will likely be up at the millinery shop. But you could call me up first at the house and find out. My telephone is Main 4356. The Sunset telephone. And if I should not be at home you could call at the Basquette Millinery Co., 617-18 Eitel building, cor. Second Ave. and Pike St. I do believe this is the first letter I ever got a chance to

write you. But I was afraid I would not get to see you when you come in Saturday. Sunday evening I attended services at Rev. J. D. O. Powers' church on 916 E. Mercer St. Miss Johnson is a member of his church. I enjoyed the services very much. You ought to come in Saturdays and stay over Sunday. You would not feel so lonesome. I don't see how I could stay so long on the ranch as I did, when I think of it. There is so much to go to here, and so much to learn. Like Rev. Powers said Who has ever loved knows all that life contains of sorrow and joy. I am afraid I will be going there right along. I do like so to hear him. I would not mind to have an apple now. The apples you buy are not very good. Must now close see you Saturday. Your wife, Anna."

The court denied plaintiff any relief, saying:

"I feel this way, that before the court would be authorized in granting a divorce in any case, the evidence ought to be to make it fairly certain that such a condition was existing to make it impossible for the people to live together. Our supreme court has held that incompatibility in temperament is not a ground for divorce. I cannot find that the evidence in this case would show where there is grounds for divorce. The whole trouble seems to be that the plaintiff wishes to live in Seattle rather than live on a farm. I sometimes wonder whether the courts can get at the real truth, and I don't know whether I have gotten at the real truth in this case. This husband may have been such that her life has been made a burden to her, but I cannot find it in this case. I don't believe there is a dozen families in Kitsap county where you could not make even a stronger showing than the wife has made in this case. While I don't believe in keeping people together where their lives would be ruined, but this woman is old enough to know what she is doing now, and if the reason why she wants a divorce is because she does not want to live on the farm, that is not grounds for divorce and I shall deny it."

It is true that this court and most others have said that a divorce will not be granted merely because the parties cannot live together. The term "incompatibility of temperament" cannot be accurately defined. No husband or wife

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should be allowed to quit the domestic relation who is in fault, or because of those quarrels and displays of temper which are apt to occur between husband and wife where the spirit is balanced and neither is greatly dominant. But here there is no evidence of quarrel or temper. The parties have drifted apart, if indeed there was ever an actual understanding between them. There is no evidence of love, sympathy, or interest. Both agree that they will never live together as man and wife. The defendant says "probably not"; the record says in no uncertain tone that they never will. Much is made of that part of the letter quoted above which reads: "I don't see how I could stay so long on the ranch as I did, when I think of it. There is so much to go to here, and so much to learn." Counsel says, "Too many homes are broken up because the twentieth-century wife is not content with the comforts and small luxuries the husband can afford. The trial court could plainly see from her actions and testimony that all she cares for is whatever money she can get out of the defendant by divorce proceedings and freedom to live in the city."

We do not so read the letter. Plaintiff had no social life; she had never been taken to the neighbors or away from the farm, unless it was upon a business errand; she was offered no form of entertainment; she says, "I sometimes wondered if I was his wife or servant." The letter does not indicate, nor is there a scintilla of evidence to sustain the idea, that plaintiff is or ever intends to seek the lighter life of the city. If to go to church, to attend lectures, to be impressed as plaintiff seems to have been impressed, indicates a wanton disposition to abandon a proper home and seek other companions and other ways, we know not how a woman situate as was this plaintiff could sustain herself before the world. That she has loved defendant, the letter shows; there is a sympathy through it all. There is much meaning in the words: "I do believe this is the first letter I ever got a chance to write you." It shows that plaintiff had been denied much

that is essential to the feminine soul, and breathes a sentiment of rare refinement. The trial judge says: "I sometimes wonder whether the courts can get at the real truth and I don't know whether I have gotten at the real truth in this case." Rarely indeed is the whole truth spoken in divorce cases, and it is perhaps as well that it is not; but, as we read this record, the truth is not far concealed. The marriage of a young woman, with her fresh ideals of the marriage relation, to a man in middle life who has experienced the romance of youth and from whose soul the sentiment of that time has apparently passed forever, cannot bring enduring happiness. The one is growing in health and spirit and in aspiration; the other is content with the dead level of every-day life and dull environment. There is nothing in common between these two, and there never will be. Nature has put a bar between them. Their venture has resulted, as such ventures are most apt to result, in tragedy and shattered hopes. The law provides for divorce. So long, then, as it does, courts are bound to do that which will do the greater justice to the parties and to society. These people will not live together; their interest and the interest of society surely will not be served by keeping them in bondage, one to the other, and denying them freedom from a loveless marriage.

"It would be a mockery to speak of the relation as a marriage. It was a marriage in name only. The substance was entirely wanting. It is apparent from all the testimony that the appellant had no love or affection for the cross-appellant." *Gibson v. Gibson*, 67 Wash. 474, 122 Pac. 15.

Some men are satisfied in the domestic relation if they have a woman in the kitchen. Some women are satisfied if they have a roof over their heads, enough to eat, and something to wear. But the woman who is true to the instincts of her sex must have love, or the marital relation is intolerable. With it, she will bear any burden, forgive any wrong and her heart will be light through all misfortunes. Counsels' conception of conjugal duty is wrong. It is true that

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the record discloses no blows nor words that the law accepts as evidence of cruel treatment, but the utter indifference and cold neglect of a spouse may bruise harder than a blow and leave a sting sharper than words.

The law treats marriage as a civil contract; it relieves parties from improvident contracts and contracts where there is no consideration. The legislature has seen fit to say, after stating some special grounds for divorce, that "a divorce may be granted upon application of either party upon any other grounds deemed sufficient, and the court shall be satisfied that the parties can no longer live together." Rem. & Bal. Code, § 982 (P. C. 159 § 1). We have not overlooked the cases of *Bickford v. Bickford*, 57 Wash. 639, 107 Pac. 837; *Wheeler v. Wheeler*, 38 Wash. 491, 80 Pac. 762, and the later case of *Pierce v. Pierce*, 68 Wash. 415, 123 Pac. 598. These cases can be distinguished. In the *Bickford* case, we said:

"It is not enough that the record may convince the court that the parties can no longer live together. Some cause for that condition must be found, and the cause must not be brought about by the misconduct of the party seeking the divorce."

In the *Wheeler* case, it was held that there must be some cause shown from which the finding that the parties can no longer live together can be drawn. In the *Pierce* case, the respondent insisted that she was possessed of an affection for the appellant, ready to forgive and receive him back as her husband, and it was clear that respondent was entirely without fault. We find in this case that the parties have no love, one for the other, and that defendant's attitude toward his wife has been such as to make her life burdensome and entitle her to relief. If a divorce is not granted at this time, it seems certain that defendant will in due season bring an action against the plaintiff and be entitled to a decree upon the ground of desertion. It can make no difference upon what ground or to which party the divorce is granted. It is

enough if a divorce be granted at the suit of either party when they have submitted themselves to the jurisdiction of the court, and cause appears.

It is apparent from the record that defendant is possessed of some means. Perhaps all of it was his own at the time of the marriage, but plaintiff is entitled to some consideration. The judgment will be reversed and the cause remanded, with instructions to the lower court to enter a decree of divorce, and command defendant to pay to plaintiff the sum of \$1,250; \$500 ninety days after the remittitur goes down, \$500 six months thereafter, and \$250 as suit money and attorney's fees, 30 days after the remittitur goes down.

Crow, C. J., Gose, and PARKER, JJ., concur.

MOUNT, J., dissents.

[No. 11184. Department Two. August 11, 1913.]

CHARLES OSTROSKI, *Respondent*, v. BLUMAUER LOGGING
COMPANY, *Appellant*.¹

MASTER AND SERVANT—INJURY TO SERVANT—INCOMPETENT FELLOW SERVANT—NEGLIGENCE OF MASTER—QUESTION FOR JURY. Negligence in employing an incompetent engineer to run a donkey engine in a logging camp is a question for the jury, where it appears that the fireman, a Japanese boy, was allowed to temporarily run the engine during the absence of the engineer, that he was inexperienced, excitable and reckless, and that complaint had been made of him as incompetent, two or three days before the accident.

SAME—CAUSE OF INJURY—EVIDENCE—QUESTION FOR JURY. The negligence of an inexperienced engineer in starting a donkey engine "faster than usual" when signalled to pull on a log that was obstructed, is a question for the jury, where there was evidence that an experienced man would have started the engine slowly to avoid injury through swinging of the log, which occurred at the time in question.

SAME—DUTY TO WARN—NECESSITY—EVIDENCE—SUFFICIENCY. It cannot be said, as a matter of law, that a warning was given, or that

¹Reported in 134 Pac. 521.

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It was unnecessary, where a man, without practical experience as a logger, working as a signalman in the woods near a cable for about two weeks, was injured while giving a signal and standing in the bight of the cable, there was evidence that he was not warned of the danger, and was instructed by the foreman to give the signal at any point without crossing the road, and the foreman himself sometimes gave the signal from the same position.

SAME—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY. A signalman, without experience as a logger, is not guilty of contributory negligence, and does not, as a matter of law, assume the risk of injury from the swinging of a log, while he was giving a signal from a stump on the bank six feet above the log in the ravine below, especially where he was following the general instructions of the foreman to give the signals from the nearest point.

Appeal from a judgment of the superior court for Thurston county, Sheeks, J., entered November 2, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Affirmed.

Murphy & Wall and Peters & Powell, for appellant.

Teats, Metzler & Teats, Bigelow & Manier, and *Ben S. Sawyer*, for respondent.

ELLIS, J.—This is an action to recover damages for personal injuries, sustained by the plaintiff while employed in the defendant's logging camp. Plaintiff is of foreign birth, and testified largely through an interpreter. Defendant's operations consisted in the falling of trees, cutting them into log lengths, and in hauling them from the woods to a point where they were loaded on cars for transportation on a logging road. The log, where felled, was beveled at one end, and around it was placed a short piece of wire rope, called a "choker," which was hooked to a main cable. By means of a "donkey" engine, the log was then pulled to a place nearer the loading station called the "yard," where the choker was detached from the yard engine cable, and fastened to the steel wire cable which led to the donkey located just beyond the loading station. From the yard to the loading station,

the logs were dragged along a dirt road, five or six feet wide, which, at a point approximately 400 feet from the loading station, passed through a narrow canyon with steep sides about six feet high. Here the road made a rather sharp curve to the left; and on the left side of the road, looking towards the station engine, was a post upon which was a spool or wheel over which the cable ran to keep it free from the rocks. Plaintiff was stationed at this point, his duties being to see that the cable ran on the spool, that the road was kept clear of obstructions, and to readjust the choker or take other steps necessary to free the logs when they became snubbed against the bank or otherwise obstructed at this point. A main signal wire ran from the station donkey to the yard, passing at a height of from five to eight feet over the place where plaintiff was working. A branch signal was attached to the main wire and ran across the road and beyond a point opposite the pulley post. By the use of this branch wire, it would not be necessary in signaling to get in the curve or bight of the cable.

In the afternoon of February 17, 1912, a log in its progress from the yard to the loading station became jammed against a windfall on the opposite side of the road from the pulley post. The choker was attached to this log near the middle, instead of near the front end as was proper. Plaintiff readjusted the choker so as to bring the hook to the left side of the log in the hope that it would thus be pulled away from the obstruction. He then mounted a stump on the left side of the road about six or seven feet from the log, and opposite a point near its front end, and pulled the main signal wire. The engine was started quickly, and the log suddenly swung, striking the plaintiff and inflicting the injuries of which he complains. The evidence also tended to show that the work was dangerous for an inexperienced man. The trial resulted in a verdict in favor of the plaintiff. At appropriate times, the defendant moved for a nonsuit, to withdraw the whole case from the jury, to withdraw the ques-

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tion of the engineer's incompetency, for judgment notwithstanding the verdict, and for a new trial, all of which motions were denied. Judgment was entered on the verdict, and the defendant has appealed.

The appellant contends that the court should have taken the case from the jury and rendered judgment for the appellant for two reasons: (1) That there was no evidence of negligence on the appellant's part; (2) that the danger was obvious, that respondent assumed the risk, and was himself negligent.

I. The negligence charged in the complaint was, first, that the appellant negligently employed an incompetent engineer to run the donkey engine; second, that it failed to give the respondent such instructions as to his work and such warning of its dangers as his inexperience and lack of knowledge demanded.

It is elementary that, upon motion to take a case from the jury, the evidence with all of its justifiable inferences must be considered most strongly in favor of the party opposing the motion. At the time of the accident, the donkey engine was being operated by the fireman, a Japanese boy, the engineer being ill. Though the Japanese boy had been employed by the appellant as fireman for about three years, the evidence showed that his actual knowledge as to the operation of the donkey was such as he had acquired by observing the work as fireman, and, as testified by one witness, by being permitted at different times for short intervals when the engineer was busy at something else to "make a pull." While the foreman in charge of the work testified rather indefinitely that this fireman had at different times run the donkey "maybe two or three days, a week, or maybe two or three weeks at a time," no one else testified to his operating it except by occasional permission of the engineer prior to the time of the accident and two or three days before. On the whole, the appellant's evidence showed that his actual experience was meager. His qualification was, we think, accu-

rately summed up by one of the appellant's witnesses, himself an engineer, who said:

"Well, I couldn't say that he appeared as an experienced engineer at all, but he appeared to handle it fairly well. Of course, he would make a mistake sometimes and maybe get hold of the wrong lever, as any man who was not experienced with it would do, but as an amateur he was as good as any of them."

Where safety or even life may depend upon the handling of an engine, something more than amateur proficiency and experience should be found in the engineer. The respondent introduced evidence to the effect that the Japanese in running the engine was "excitable," that sometimes when signals were frequent he would get "rattled," and that he was "reckless." One witness testified that, two or three days before the accident, while the witness was working in the bight of the cable, the Japanese handled the donkey so recklessly that the witness complained to the foreman. If he was incompetent, the appellant was affected with notice of that fact, both by its knowledge of his inexperience and by this complaint. Under the evidence, both the question of his incompetence and appellant's negligence in placing him in charge of the engine were matters for the jury. *Seewald v. Harding Lumber Co.*, 49 Wash. 655, 96 Pac. 221; *Pearson v. Alaska Pacific Steamship Co.*, 51 Wash. 560, 99 Pac. 753, 130 Am. St. 1117; *Emery v. Tacoma*, 71 Wash. 132, 127 Pac. 851.

The appellant also contends that there was no evidence that any improper handling of the engine contributed to the injury. The testimony of the regular engineer, a man of experience, was to the effect that an experienced engineer is largely guided, not only by the signals, but also by the action of his engine, and will regulate its speed according to the resistance; and an experienced engineer on receiving a signal would at first go slowly in order to avoid injury to the man at the log before he could get out of the way; that if the engine was started quickly, an obstructed log if choked in the

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middle would invariably swing around. Other evidence tended to show that, if a log was obstructed, it was likely to swing, and that if the choker was near the middle it would be more apt to do so, a fact of which the respondent professed ignorance. The evidence showed that the log here in question was, at least when it reached the place of the accident and became obstructed, choked some distance from the end and that the injury was caused by its swinging. There was also evidence that the Japanese started the engine "faster than usual." Though much of this was controverted by appellant's evidence, the conflict made the question one for the jury. It was for the jury to say whether the engine was started in an unusual manner and whether that fact contributed to the injury by causing the log to swing suddenly while the respondent was in a place of danger.

Passing to the second claim of negligence, namely, failure to properly instruct and failure to warn, we find that the respondent was under the immediate direction of a skid boss, but also under the general control and supervision of the foreman or woods boss; that he had worked in the logging camp for about four months, but only two weeks of this time at the place where he was injured. He had had no other experience as a logger. He could not understand the English language and had to be instructed by demonstration. He testified that the skid boss first showed him how to make signals and how to place the cable on the pulley and adjust the choker on the logs, and instructed him to give the signals by means of the branch signal wire on the right-hand side of the road and extending a sufficient distance therefrom to enable the signals to be given without danger; that he did as he was directed for a few days, and until the foreman, observing that the respondent was crossing the road to give the signals, told him to give the signals from any place, wherever he happened to be, and instructed him by motions to pull the main wire, which was on the left of the road, near it and within the bight of the cable. The foreman denied

this, but also testified that he himself sometimes gave signals by the main line from the stump on the bank apparently where the respondent was standing when he was injured. The respondent also testified that he was not warned of the dangers of getting in the bight of the cable, nor of the danger from swinging logs. Several of the appellant's witnesses testified that he was so warned repeatedly. But if the respondent's testimony is to be believed, he was not warned, and the instructions of the foreman to signal from wherever he might be was calculated to allay his caution. *Anustakas v. International Contract Co.*, 57 Wash. 458, 107 Pac. 342. The skid boss testified that he knew the respondent was not a practical woodsman or logger. It would seem that such a man should be thoroughly cautioned as to the dangers of the work. The credibility of the witnesses and the weight of the evidence were for the jury. We cannot say, as a matter of law, either that the warning was given or that it was unnecessary. *Jancko v. West Coast Mfg. & Inv. Co.*, 34 Wash. 556, 76 Pac. 78.

II. We find the appellant's claim of assumed risk and contributory negligence equally untenable. It cannot be said that the danger of a log swinging to such a height as to strike the respondent while standing on a stump situated upon the bank six feet above where the log lay in the ravine below was a danger so obvious to a man of his limited experience as a logger that the taking of that position imposed upon him, as a matter of law, an assumption of the risk. The same consideration disposes of the charge of contributory negligence. This is especially true in view of the fact that, if his testimony is believed, in taking this position he was following the instructions of the foreman. While he was not acting under a direct order at the time, he was acting in pursuance of the general direction of the foreman to give the signals from the nearest point wherever he happened to be, and it seems clear that, after adjusting the choker in such a way that he thought it would free the log

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from the obstruction on the opposite side of the ravine, he selected the point nearest and most accessible for giving the signal. It cannot be said, as a matter of law, that in so doing he did not act as an ordinarily prudent man of his experience would have acted under like instructions and conditions. Obviously, reasonable minds might differ on the subject. *Dumas v. Walville Lumber Co.*, 64 Wash. 381, 116 Pac. 1091.

Several of the assignments of error are based upon the giving of certain instructions and the refusal to give others. They are sufficiently disposed of by what we have already said of the evidence. The law of the case is well settled.

The judgment is affirmed.

FULLERTON, MAIN, and MORRIS, JJ., concur.

[No. 11136. Department Two. August 12, 1913.]

J. N. BOGART, *Plaintiff*, v. SOUND MOTOR COMPANY,
Defendant, C. E. BREAKEY, *Garnishee Defendant*, E. C.
MILLION, *Intervener and Appellant*, KINGSTON
WHARF COMPANY, *Intervener and Respondent*.¹

WHARVES—LEASE—ABANDONMENT—RIGHT TO EARNINGS. Upon the abandonment of a wharf by a lessee, the lessor refusing the required consent to an assignment of the lease, the right to possession and subsequent earnings reverted to the original owner, as against the lessee and one claiming under it.

Appeal from a judgment of the superior court for King county, Main, J., entered September 30, 1912, in an intervention. Affirmed.

George Friend, for appellant.

C. H. Winders, for respondent.

FULLERTON, J.—The Kingston Wharf Company owns a dock situated on Puget Sound near the town of Kingston.

¹Reported in 134 Pac. 468.

On August 18, 1908, the company leased the dock to one Smith for a term of ten years, the lease being conditioned that the lessee should maintain and keep in repair the dock and pay to the lessor the sum of \$15 per annum. The lease also contained a clause to the effect that the lease should not be assigned without the written consent of the lessor. On October 2, 1910, Smith, with the written consent of the lessor, assigned the lease to the Sound Motor Company, the lessor stipulating in the consent given to the assignment that the assignor of the lease should not further assign the lease without its written consent. On July 12, 1910, E. C. Million advanced money to the Sound Motor Company, and took an assignment of the lease subject to consent of the lessor. This consent the lessor refused to give, and Million subsequently made no claim of interest in the property by virtue of the assignment. At the time of the execution of the lease to Million, the dock was in possession of one Breakey, who held as agent of the Sound Motor Company. The motor company, at the time of the assignment to Million, abandoned its control over the dock; in fact, it ceased from that time to do business as a going concern. The dock, however, continued in the possession of Breakey, and on October 1, 1910, the motor company assigned to Million all money then due or thereafter to become due as wharfage for the use of the dock until the same should amount to \$750.

While the Sound Motor Company was in possession of the dock, it incurred a liability for repairing the same to one Bogart in the sum of \$678. Thereafter Bogart sued the company and obtained a judgment against it for the amount due, and on November 28, 1910, sued out a writ of garnishment against the wharfinger Breakey, alleging that he had money and property in his possession belonging to the Sound Motor Company. The garnishee answered the writ averring that he had in his possession the sum of \$263.05 which he had collected as wharfage and which he was desirous of paying over to whomsoever it might belong; averring, further, that

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the same was claimed by Million in virtue of the assignment from the Sound Motor Company, and by the Kingston Wharf Company, in virtue of its ownership of the property, and asked that these parties be brought into the proceedings, and required to set forth their claims and that he be permitted to pay the money in his hands to whomsoever it should be adjudged it rightfully belonged. The Kingston Wharf Company and Million thereafter intervened in the proceedings, and on the hearing the court adjudged the money to belong to the Kingston Wharf Company. Million appeals.

It is our opinion that the judgment is right. The evidence makes it clear that none of the money in the hands of garnishee was earned by the dock prior to the abandonment of it by the Sound Motor Company. Upon such abandonment, the right of possession of the wharf, and the right to its earnings, reverted to the original owner of the property, and thereafter it was entitled, as against the Sound Motor Company or any one claiming under it, to the wharf's earnings.

The judgment is affirmed.

CROW, C. J., ELLIS, MORRIS, and GOSE, JJ., concur.

[No. 11187. Department Two. August 12, 1913.]

E. S. STEWART *et al.*, *Respondents*, v. ROY E. LARKIN *et al.*,
Appellants.

E. S. STEWART *et al.*, *Respondents*, v. JOHN F. LARKIN *et al.*,
Appellants.¹

VENDOR AND PURCHASER—RESCISSION BY VENDEE—MISREPRESENTATIONS. Vendees are not entitled to rescission of contracts for the sale of land, for false representations that the lands would be irrigable by means of an irrigation project, which was mere promoter's talk and upon which nothing had been done, the vendees made their own investigation, and the parties were strangers to one another having equal means of knowledge; as the representations were not as to existing facts, but mere opinions based on hearsay.

¹Reported in 134 Pac. 136.

APPEAL—NOTICE OF APPEAL—DESIGNATION OF PART OF JUDGMENT—REVIEW. Where a judgment was given for plaintiff without any reference to defendant's cross-complaint, a notice of appeal by defendant designating the judgment appealed from as one in favor of plaintiff for a specified sum and costs, is not sufficient as an appeal from that part of the judgment dismissing the cross-complaint, which accordingly cannot be reviewed; in view of Rem. & Bal. Code, §1719, requiring appellant to designate with reasonable certainty the part of the judgment appealed from.

Cross-appeals from a judgment of the superior court for Whatcom county, Kellogg, J., entered September 3, 1912, in favor of the plaintiffs, except as to defendant Miller, in an action for rescission. Reversed except as to defendant Miller.

Jeremiah Neterer and Moulton & Henderson, for appellants.

Thomas Smith and E. C. Million, for respondents Stewart *et al.*

Jeremiah Neterer, for respondent Miller in answer to respondents Stewart *et al.*

MORRIS, J.—These are consolidated actions to rescind conveyances of land and to recover back purchase price and damages. The land lies in Benton county, east of Kennewick, in what is known as the Horse Heaven country; and the ground of action is that appellants, in order to induce the purchase of lands, falsely represented that the lands would be irrigable by means of a canal or ditch which would be a part of what is referred to in the record as the "Klickitat Irrigation Project." Judgment went against all defendants except L. E. Miller, from which appeal is taken. The plaintiffs bring a cross-appeal because of the court's failure to find against Miller.

Accepting the evidence most favorable to respondents, it appears that Stewart, representing himself and the other respondents, went to Kennewick for the purpose of looking up land in that vicinity. While at Kennewick he met appellants McGuire and Van deBogart, real estate agents, to whom he

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was introduced by Miller; that McGuire showed him a number of pieces of land, but finally they concentrated their attention upon the two pieces in suit, owned by the Larkins. McGuire told Stewart that the canal of the Klickitat company when constructed would run on the north side of the divide in such a way as to bring the two pieces of land beneath and subject to irrigation from it. Stewart visited the land a number of times, made inquiries as to price and methods of farming from an old acquaintance owning lands in the vicinity, and from others at Kennewick, and finally contracted to take the land at \$20 an acre including the wheat crop. McGuire also gave Stewart the address of a man at Prosser who was supposed to know something about the irrigation scheme of the Klickitat company; at least, was interested in obtaining contracts for water rights. McGuire also made statements to Houser, one of the respondents, to the effect that the land would be under the ditch, and told Houser of engineers in Seattle who were supposed to have something to do with the scheme. Other testimony is to the effect that Stewart was told by McGuire to stop at Seattle on his return and investigate as to the irrigation scheme, as all he knew about it was what had been told him; and the old acquaintance of Stewart's who owned land in the vicinity also testified that, when Stewart inquired of him as to the price of land and its possibilities, he told him that he knew nothing of the irrigation project other than what he had heard, and asked Stewart to look into the matter and advise him upon his return, and that when Stewart returned he told him he was satisfied, and that "if the ditch did go through he would irrigate it and cut it up into tracts, and if the ditch did not go through he could farm it as a dry farm." It is clear from all of the evidence that none of the parties knew anything about this irrigation project other than hearsay, and that it was proposed to run a ditch through the Horse Heaven country bringing the water from the Klickitat river some one hundred and fifty miles away. No work had been

done, however, and the ditch and the project of which it was a part seems at this time to have been nothing more than a promoter's scheme. It is also clear that lands in the vicinity of the lands in suit, of the same general nature and quality, were valued at from \$20 to \$30 an acre, so that it is apparent respondents received lands of the value paid for.

These are the main facts upon the point at issue, although there is much evidence as to matters occurring subsequent to the entering into the contract which cast little if any light upon the false representations claimed by one party and denied by the other. It does not seem to us that these facts support the judgment. All parties interested in this purchase knew nothing about this ditch except hearsay. Stewart knew that McGuire, nor any other person, could give him any positive or definite information as to a ditch which at that time was known to be nothing more than a part of some great irrigation scheme that some company proposed to some day undertake. There was no ditch, and Stewart and the other respondents knew there was no ditch, and the statement that there would some day be a ditch could not have been accepted by them as a statement of a positive fact nor received other than the opinion of the man who made it. There was no attempt to hide anything from respondents. Stewart visited the land a number of times, made inquiries as to its value and how it could best be farmed, and when respondents entered into their contract to purchase it they knew as much about the land as any one; or if they did not, it must be laid to the failure of the independent investigation they undertook to secure such information.

It has always been the law that where the parties deal as strangers and the means of knowledge are equally available and the lands subject to the inspection of the purchaser, and he avails himself of the opportunity of inspection afforded him, he cannot be heard to say that he has been deceived, even though the truth has been withheld from him or the facts misrepresented, as the true facts are as available to him and

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as much within his knowledge as that of the one with whom he deals. *West Seattle Land & Imp. Co. v. Herren*, 16 Wash. 665, 48 Pac. 341; *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613; *Walsh v. Bushell*, 26 Wash. 576, 67 Pac. 216; *Samson v. Beale*, 27 Wash. 557, 68 Pac. 180; *Zilke v. Woodley*, 36 Wash. 84, 78 Pac. 299; *Pigott v. Graham*, 48 Wash. 348, 93 Pac. 435, 14 L. R. A. (N. S.) 1176; *Aurora Land Co. v. Keenan*, 67 Wash. 305, 121 Pac. 469; *Conta v. Corgiat*, ante p. 28, 132 Pac. 746.

Appellants contend their judgment is well founded upon the rule announced in *Woody v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054, 132 Am. St. 1102, and other like cases, where it has been held that the tendency of modern cases is to restrict, rather than to extend, the doctrine of *caveat emptor*, and that the unmistakable drift is towards the doctrine that wrongdoers cannot shield themselves from liability by asking the law to condemn the credulity of their victims and give them an unbridled license to lie and deceive. No better illustrations of this modern tendency can be found than in the decisions of this court for the past few years; but it will be found that, in all of these late cases, there was a false assertion of an existing fact the truth of which was peculiarly within the knowledge of the vendor, or means of knowledge; or the property was at a distance and the opportunity of ascertaining the true facts not readily ascertainable; or the misrepresentation was made for the purpose of inducing the other party not to make an investigation and ascertain the true facts; or the vendor knew that the vendee did not intend to make a personal investigation but relied absolutely on the truth of the facts communicated to him. It was not intended, in any of these cases where the decision has been based upon some one of the above facts, to attempt to depart from the rule here first asserted, and the distinction between these two rules and the facts to which each is applicable is pointed out in *Woody v. Benton Water Co.*, *supra*, quoting from 14

Am. & Eng. Ency. Law (2d ed.), 120, 121, where the rule is thus stated:

“By the overwhelming weight of authority, ordinary prudence and diligence do not require a person to test the truth of representations made to him by another as of his own knowledge, and with the intention that they shall be acted upon, if the facts are peculiarly within the other party’s knowledge or means of knowledge, though they are not exclusively so, and though the party to whom the representations are made may have an opportunity of ascertaining the truth for himself. By the weight of authority, and in reason the rule that a person who is voluntarily blind as to facts concerning which false representations are made cannot complain of the same, applies only where the parties have equal present opportunity and means to ascertain the truth at the time of the transaction, and does not apply merely because it is possible to ascertain the facts. Indeed, it has been held that a person is justified in relying on a representation made to him, in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth.”

In *McMullen v. Rousseau*, 40 Wash. 497, 82 Pac. 883, this court said:

“The main contention of the appellants is that this case comes within the rule often announced by this court that, where the vendor and purchaser are dealing at arm’s length, and where the subject-matter of the sale is at hand, the purchaser must protect himself and cannot rely upon misrepresentations made by the vendor. This rule is firmly established where the representations relate to the subject-matter of the sale which is at hand, or to other facts the truth of which may readily be ascertained by the exercise of ordinary care and prudence. But the converse of this rule is equally well established where the subject-matter of the sale is not at hand, so that the truth or falsity of the representations concerning it may be ascertained, or where the representations relate to facts within the knowledge of one of the parties, and the truth or falsity of such representations cannot be ascertained by the other party upon reasonable investigation or by the exercise of reasonable care and prudence. Such are the cases of *O’Connor v. Lighthizer*, 34 Wash. 152, 75 Pac. 643;

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Mulholland v. Washington Match Co., 35 Wash. 315, 77 Pac. 497; *Stack v. Nolte*, 29 Wash. 188, 69 Pac. 753; and *Lawson v. Vernon*, 38 Wash. 422, 80 Pac. 559."

In the present case, there was no misstatement of an existing fact peculiarly within the knowledge of these appellants as to which the respondents did not have equal present opportunity and means to ascertain the truth. The thing which was of value to respondents if they sought irrigated lands was a ditch from which they could obtain water. They knew there was no ditch and that the whole project was nothing more than promoters' talk which might or might not materialize. They knew that appellants could in no wise control the building of this ditch nor shape its course when it was built, and that any statement that might be made as to its existence or course could be nothing more than the giving of an opinion based, not upon personal knowledge, but upon information derived from others. To say that, under such circumstances, a contract may be rescinded is to announce a rule that must depend upon its assertions for its authority.

The appellants John F. Larkin and wife filed a cross-complaint below in which they demanded judgment against respondents for the sum of \$598.95, representing an item of interest they were compelled to pay because of the default of respondents in paying interest upon a mortgage upon a portion of the land in suit, which mortgage also covered additional lands of John F. Larkin; and in their brief they ask for a reversal of the judgment below and for an affirmative judgment there in their favor for this \$598.95. We do not go into this demand as it does not seem to us that it is properly before us. The judgment below makes no reference to the demand of the cross-complaint. It simply grants judgment to respondents for \$2,419.99 under their prayer for relief, and awards costs to Miller. From this judgment it cannot be ascertained that any question of affirmative relief to the Larkins was ever submitted to the court below or passed upon by it. The notice of appeal refers to the judgment ap-

pealed from as, "which judgment is in favor of the plaintiffs that they recover of and from the defendants the sum of \$2,419.99, together with costs." The appeal bond refers to the judgment appealed from as "against the above named judgment debtors for the sum of \$2,419.99, together with costs." We cannot find in this notice or bond any reference to a judgment dismissing the cross-complaint, if it be assumed that this judgment so adjudicated, nor anything from which it could be ascertained that any such cross-complaint was submitted to the court for its determination. Our statute provides that the appellant shall, in his notice of appeal "designate with reasonable certainty from what judgments or orders, whether one or more, the appeal is taken;" and under this same statute, Rem. & Bal. Code, § 1719 (P. C. 81 § 1189), it is permissible to appeal from a part of the judgment only. When, therefore, the judgment consists or is interpreted as consisting of three parts, (1) for a sum of money in favor of plaintiffs and against certain defendants, (2) dismissing a cross-complaint filed by some of the defendants, and (3) in favor of other defendants for costs, and the notice of appeal only describes that part of the judgment which adjudicates in favor of the plaintiffs upon their demand against the defendants, it must be held that the appeal is taken from that part only. For these reasons, we do not consider this notice of appeal sufficient to call for a review of the demand of John F. Larkin and wife upon their cross-complaint. What we have said is sufficient to sustain the judgment upon respondents' cross-appeal from that part of the judgment in favor of Miller; and as to him the judgment is affirmed. In all other respects it is reversed and the cause remanded with instructions to dismiss.

CROW, C. J., FULLERTON, MAIN, and ELLIS, JJ., concur.

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[No. 11372. Department One. August 12, 1913.]

THE STATE OF WASHINGTON, *on the Relation of Henry Surry,*
Plaintiff, v. THE SUPERIOR COURT FOR KING COUNTY,
*Respondent.*¹

APPEAL—DECISIONS APPEALABLE—FINAL ORDER—TEMPORARY ALIMONY. An order for the payment of attorney's fees and temporary alimony each week pending a divorce case, is appealable as a final judgment, under Rem. & Bal. Code, § 1716, subd. 1, authorizing an appeal "from the final judgment entered in any action or proceeding."

APPEAL—TIME FOR TAKING—TEMPORARY ALIMONY. The fifteen days' limitation provided by Rem. & Bal. Code, § 1718, for appeals from any order other than the final order, does not apply to an appeal from an order for temporary alimony and attorney's fees in a divorce case; as it is a final order.

PROHIBITION—TO COURTS—INADEQUACY OF REMEDY BY APPEAL. Where defendant in a divorce case appealed from an order for temporary alimony and attorney's fees, and gave a supersedeas bond fixed and approved by the court, prohibition lies to prevent enforcement of the order by contempt proceedings; since there is no adequate remedy by appeal.

Application filed in the supreme court July 18, 1913, for a writ of prohibition to the superior court for King county, Humphries, J. Granted.

C. S. Goshert, for petitioner.

Thomas B. MacMahon, for respondent.

Gose, J.—This is an application for a writ of prohibition, directed to the respondent Humphries, as a judge of the superior court of King county, prohibiting him from exercising jurisdiction in enforcing an order directing the relator to pay alimony and counsel fees in a divorce action, after an appeal from such order and the filing and approval of a sup-

¹Reported in 134 Pac. 178.

ersedeas bond. The controversy arises out of the following facts:

On the 31st day of May, 1913, Elizabeth Marie Surry commenced an action for divorce in the superior court of King county against her husband, the relator, charging cruelty and failure to support. On the 14th day of June following, and after a hearing, on order directing the relator to show cause why he should not pay to the plaintiff in the divorce action a suitable sum for alimony, suit money and counsel fees, an order was entered requiring him to pay her, on Monday of each week, the sum of \$10, and to pay her attorney \$25 on the 1st day of July, and a like sum on the 1st day of August, next ensuing. On the 30th day of June, in obedience to an order to show cause why he should not be punished as for a contempt for his failure to comply with the previous order of the court, the relator was adjudged guilty of a contempt, and on the 1st day of July he was committed to the county jail. On the second day of July, the relator gave notice of appeal, and gave a supersedeas bond, fixed and approved by the court. He appealed from the orders of June 14th, 30th and July 1st. After appealing, he was again cited to show cause why he should not be adjudged guilty of contempt for his failure to pay alimony on June 30th and July 7th, and the respondent judge is continuing to exercise jurisdiction looking to the enforcement of the order of June 14th, despite the appeal and supersedeas bond. The divorce feature of the case has not been heard.

The application for a writ raises three questions: (1) Is an order directing payment of alimony and counsel fees in a divorce action appealable while the main case is pending on the merits? (2) If so, should the appeal have been taken within fifteen days after the entry of the order? And (3) if the appeal lies and was seasonably taken, should the writ issue?

The code, Rem. & Bal. § 1716, subd. 1 (P. C. 81 § 1183), provides that an appeal may be taken "from *the* final judg-

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ment entered in any action or proceeding." Is the order of June 14th *a* final judgment within the meaning of the law? The question is one of first impression in this court. In other jurisdictions, the courts have reached different conclusions as to the finality of such a judgment. We attach little importance to the fact that the legislature has used the definite article "the" rather than the indefinite article "a," although this circumstance has been adverted to by the supreme courts of California and Nebraska as having some significance. It cannot be doubted that the order is in effect a final judgment. It is definite and certain in all its terms. If disobeyed the relator must purge the contempt or suffer the deprivation of his liberty or the taking of his property in satisfaction of the order from period to period as the payments respectively mature. It would seem that, where such consequences flow from a noncompliance with an order, an appeal ought to be available to the aggrieved party and that the law-making body intended that it should be. At any rate, we will not resort to a rule of strict construction where the liberty or property of a citizen is put at hazard. *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709; *Turner v. Turner*, 80 Cal. 141, 22 Pac. 72; *Hecht v. Hecht*, 28 Ark. 92; *Kendrick v. Kendrick*, 105 Ga. 38, 31 S. E. 115; *Williams v. Williams*, 114 Ga. 772, 40 S. E. 782; *Blake v. Blake*, 80 Ill. 523; *McCue v. McCue*, 149 Ind. 466, 49 N. E. 382; *Lochnane v. Lochnane*, 78 Ky. 467; *McKennon v. McKennon*, 10 Okl. 400, 63 Pac. 704; *Marx v. Marx*, 94 Mo. App. 172, 67 S. W. 934.

In the *Sharon* case, it was said that "a final judgment is not necessarily the last one in an action;" and that an order for the payment of alimony "possesses all the essential elements of a final judgment and nothing remains to be done except to enforce it." The court in that case observed that the code provided for an appeal from "*a* final judgment, not from *the* final judgment" in an action.

In the *Hecht* case, in passing upon a like order, the court said:

"This is a definitive judgment, upon which the appellant can have no relief by the final decree, even though it should appear that injustice had been done him. By due process on the execution the money will have been collected and paid over to the parties in whose favor it is awarded, and its recovery will have passed beyond the power of the court."

In the *Lochmane* case, it was said:

"That an appeal may be taken from a decree making an allowance to support the wife pending a suit for divorce cannot be questioned. It possesses all the essential elements of a final judgment. It may be enforced by rule or execution, and is in every respect independent of the final determination of the court as to the rights of the party in regard to the question of divorce."

In the *Blake* case, the court said:

"It is a money decree, is for a specific sum, and is payable absolutely. No execution has been as yet awarded, but the court has the undoubted authority to award an execution, or if payment was wilfully and contumaciously refused, the decree might be enforced by attachment, as for contempt, or payment might be coerced by sequestration of real or personal estate. . . . It is apprehended there can be no decree against a party, that will work a deprivation of his property or liberty, from which no appeal or writ of error will lie. Such is the decree against the defendant. Under it he may be deprived of his liberty, or his property subjected to levy and sale."

The case seems so sound in principle and the reasoning is so convincing that there is little left to be said. That this view may put a deserving wife to a great inconvenience, that it may expose her to hardship, must be admitted. The confinement of an impecunious husband in jail is likewise a hardship; but these are only circumstances to be considered in arriving at a proper interpretation of the statute.

Counsel for respondent argued at the bar that the right of appeal depends upon the proper interpretation of subd. 6 of § 1716, Rem. & Bal. Code (P. C. 81 § 1183), and that, reasonably construed, it does not authorize an appeal from

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orders for the payment of alimony in divorce cases. This contention has been met by the preceding discussion of the case.

In the following cases it was held that an appeal will not lie from such an order: *Aspinwall v. Aspinwall*, 18 Neb. 468, 25 N. W. 623; *McBride v. McBride*, 119 N. Y. 519, 23 N. E. 1065; *Call v. Call*, 65 Maine 407; *Ross v. Ross*, 47 Mich. 185, 10 N. W. 193.

In the *Aspinwall* case, it is said that the judgment or decree from which an appeal lies under the statute "must be the final or main judgment or decree in the case, otherwise the definite article would not be used in stating it."

In the *Ross* case, it was held that an order directing the payment of alimony was not appealable, but that an order committing the one in default for not paying alimony in obedience to an order was appealable. It seems to us that both orders are equal in finality.

The code, Rem. & Bal. § 1718 (P. C. 81 § 1187), provides that "an appeal from any order other than a final order from which an appeal is allowed by this act" must be taken within fifteen days after the service of a copy of the order from which an appeal is prosecuted. The order being a final one, the fifteen day limitation has no application.

The third inquiry is, shall the writ issue? We think it should. The respondent is attempting to proceed without jurisdiction and there is no "plain, speedy and adequate remedy in the ordinary course of law." Rem. & Bal. Code, §§ 1027, 1028 (P. C. 81 §§ 1781, 1783). That the remedy by appeal from the judgment determining the plaintiff's right to a divorce is inadequate, is apparent, (a) because the judgment upon that issue may be against the wife, and (b) because the relator may either be deprived of his liberty or compelled to appeal from and supersede an order of commitment once a week until the case is tried on its merits.

Let the writ issue.

CHADWICK, PARKER, MOUNT, and FULLERTON, JJ., concur.

[No. 10834. Department Two. June 13, 1913.]

MITCHELL, LEWIS & STAYER COMPANY, *Appellant*, v. A. A. SMITH *et al.*,
Respondents.¹

Appeal from a judgment of the superior court for Franklin county, Holcomb, J., entered July 16, 1912, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action on contract. *Affirmed*.

Belden & Losey, for appellant.

Chas. W. Johnson, for respondents.

PER CURIAM.—This is an action brought by the appellant against the respondents upon an open account. In its complaint the appellant alleged that, between September 16, 1905, and October 29, 1911, it sold and delivered to respondents goods, wares and merchandise of the reasonable and agreed value of \$7,862.38; that the respondents paid thereon \$7,242.56, leaving a balance due and owing to the appellant of \$619.82, which balance the respondents refused and neglected to pay. An itemized statement of the account was attached to the complaint and made a part thereof. The answer of the respondents was a general denial.

The controversy at the trial was waged over the price of two 12-foot Champion headers. The evidence showed that, on December 5, 1905, the respondent gave a written order to the appellant for certain described farm machinery. As originally written the order called for two 12-foot Champion headers, and six 14-foot Champion headers. At some time and some place, none of the witnesses knew when or where or for what reason, the description of the 12-foot headers was erased from the order by drawing a line through it, and the written word "six," fixing the number of 14-foot headers, was erased in the same manner and prefixed by the figure eight. After the order had been sent in, the respondents sought to have it cancelled, and sent letters and telegrams to the appellant to that effect. The appellant, however, refused to cancel the order, and shipped to the respondents eight of the 14-foot headers, and two of the 12-foot size. The respondents refused at first to receive the same or take them from the car in which they were shipped, and the appellant sent one of its agents to their place of business to adjust the matter. The agent and the respondents entered into a new agreement at that time by which the respondents were induced to take possession of the headers. The nature of this agreement is the chief matter in dispute. The appellant contends that no change was made in the original terms of the sale of the property, and that

¹Reported in 132 Pac. 880.

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the only change made in the contract at all was that it gave the respondents a special warranty, covering the two 12-foot headers, guaranteeing them to work satisfactorily and agreeing to take them back and return the purchase price in case they failed to do so. The respondents say they took all of the headers on consignment, agreeing to dispose of them as the appellant's property and not as their own. In the course of time, all of the 14-foot headers were sold to users, but the respondents were unable to sell the two 12-foot ones, and still have them on hand, subject, as they contend, to the appellant's orders.

We shall not review the evidence. It is sufficient to say that it is conflicting, and that there is much that tends to support the contentions of each of the parties. But we think the evidence preponderates in favor of the view that no actual sale of the headers was made by the appellant to the respondents. As this view accords with the findings of the trial judge, we direct that the judgment be affirmed.

[No. 11118. Department Two. June 21, 1913.]

GRIFFITH H. GRIFFITH, as *Executor of the Estate of John Henry Hughes*, Appellant, v. MRS. A. KLEIN et al., Respondents.¹

Appeal from a judgment of the superior court for King county, Frater, J., entered October 24, 1912, upon findings in favor of the defendants, in an action for conversion, after a trial to the court. Affirmed.

Van Dyke & Thomas, for appellant.

Bo Sweeney, for respondents.

PER CURIAM.—This action was commenced by the appellant to recover the value of certain local improvement bonds, issued by the city of Everett, of the aggregate value of \$10,000, which bonds it was alleged respondent Klein had wrongfully taken possession of and converted to her own use. Respondent set up, by way of answer, her ownership and rightful possession of the bonds. The issues were determined in favor of the respondent, and the executor appeals.

The case resolves itself here, as in the court below, into a pure question of fact as to the ownership of these bonds at the time of the decease of John Henry Hughes. The lower court has found in favor of respondent, and after reading the record we are not prepared to say that it was not justified in so doing. No good purpose would be

¹Reported in 132 Pac. 1013.

served by a recital of the facts or the evidence introduced by the parties to sustain the respective contentions. Not being able to say from the record that the lower court has not followed the preponderance of the evidence in making its findings, and the evidence being ample to sustain them, they are sustained and the judgment is affirmed.

[No. 10894. Department One. July 16, 1913.]

MARY LIEBECK, *Respondent*, v. H. P. WILSON, *Appellant*.¹

Appeal from a judgment of the superior court for King county, Main, J., entered May 11, 1912, upon findings in favor of the plaintiff, in an action on promissory notes, tried to the court. Affirmed.

F. C. Reagan, for appellant.

Robert A. Devers, for respondent.

CHADWICK, J.—In the year 1906, respondent loaned appellant \$4,000. In January, 1907, a loan of \$2,000 was made. On July 1st, 1909, the parties adjusted their affairs and new notes were given, one for \$4,000 and two for \$2,000, making in all \$8,000. It seems to be conceded that the \$6,000 originally loaned was for the benefit of the Wilson Coal Company, a corporation, in which appellant and other members of her family owned a considerable block of stock and of which she was an officer. Action was begun to compel payment of these notes, and the appellant interposed the defense of usury. She testifies that she was charged a bonus of \$850 on the original \$4,000 note, and \$375 on the original \$2,000 note; that she has paid a part of these exactions and that, on the readjustment of the amounts due and the giving of the additional \$2,000 note, that the unpaid part of the original bonus and an additional bonus was included therein. Respondent's testimony tends to show that the amount alleged to have been paid or promised to be paid as bonuses were due for services rendered by her to the Wilson Coal Company, and for advances made to George Wilson, a brother of the appellant; that neither of the present parties were able to determine the true amount due upon the settlement of July 1st, 1909, and the readjustment of their differences was left entirely to George Wilson, who was at the time, and for a long time prior thereto had been, general manager of the company.

The trial court found, on this disputed state of facts, that the transaction was not tainted with usury, and rendered a judgment in favor of respondent. We have read the record carefully, and are

¹Reported in 133 Pac. 468.

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convinced that, although appellant's testimony is positive, she has, nevertheless, not met the burden of proof. The testimony of respondent is equally positive, and it is sustained by many circumstances not now necessary to detail.

The findings of the trial court will not be disturbed.

This conclusion makes it unnecessary to discuss the law of usury, which has been ably presented in the briefs of counsel.

Affirmed.

Gose, Mount, and PARKER, JJ., concur.

[No. 10193. *En Banc*. July 17, 1913.]

ADA STELLA JOHNSTON *et al.*, Respondents, v. SUPERIOR PORTLAND CEMENT COMPANY, Appellant.¹

Appeal from a judgment of the superior court for Skagit county, Kellogg, J., entered October 25, 1911, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for the wrongful death of an employee in a quarry. Reversed.

Ira Bronson, for appellant.

J. L. Corrigan and M. P. Hurd, for respondents.

ON REHEARING.

PER CURIAM.—Upon a rehearing of this case by the court *En Banc*, the majority still adhere to the original opinion as found in 69 Wash. 250, 124 Pac. 1119, and for the reasons there given are of the opinion that the judgment should be reversed and the cause dismissed.

[No. 10582. *En Banc*. July 30, 1913.]

O. YAMAOKA, Respondent, v. J. S. KLOEBER, Appellant.²

Appeal from a judgment of the superior court for King county, Ronald, J., entered March 30, 1912, upon findings favorable to the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Preston & Thorgrimson, for appellant.

Shank & Smith, for respondent.

¹Reported in 133 Pac. 460.

²Reported in 133 Pac. 1037.

Opinion Per Curiam.

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ON REHEARING.

PER CURIAM.—The court has considered this case upon rehearing, and the majority of the court adhere to the opinion as reported in 71 Wash. 598, 129 Pac. 387, and for the reasons there given, the judgment should be affirmed.

[No. 10364. *En Banc*. July 31, 1913.]

HOKO RIVER BOOM COMPANY, *Appellant*, v. ALSTON FAIRSERVICE *et al.*,
Respondents.¹

Appeal from a judgment of the superior court for Clallam county, Still, J., entered February 15, 1912, dismissing an action to cancel a tax deed, upon sustaining an objection to the introduction of any evidence. Affirmed.

Trumbull & Trumbull, Peters & Powell, and *Marion Edwards*, for appellant.

William B. Ritchie and *Fletcher & Evans*, for respondents.

ON REHEARING.

PER CURIAM.—The court has considered this case upon rehearing and the majority of the court adhere to the opinion as reported in 69 Wash. 357, 125 Pac. 145, and for the reasons there given, the judgment should be affirmed.

[No. 10951. Department One. August 4, 1913.]

GREAT NORTHERN RAILWAY COMPANY, *Appellant*, v. FIDELITY AND
DEPOSIT COMPANY OF MARYLAND, *Appellant* AND ELWOOD
LUMBER AND TIMBER COMPANY *et al.*, *Respondents*.²

Appeal from a judgment of the superior court for King county, Tallman, J., entered July 24, 1912, upon findings in favor of the defendants, in an action upon contract, tried to the court. Affirmed.

F. V. Brown, *F. G. Dorety*, and *William W. Wilshire*, for appellants.

Benton Embree, for respondent Cline Lumber Company.

PER CURIAM.—This case involves the same questions as are involved in *Northern Pac. R. Co. v. Fidelity & Deposit Co.*, ante p. 543, 134 Pac. 498. For the reasons there given, the judgment in this case is affirmed.

¹Reported in 133 Pac. 1037.

²Reported in 134 Pac. 500.

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Opinion Per Curiam.

[No. 10410. *En Banc*. August 4, 1913.]

ELEANOR HERRICK *et al.*, Appellants, v. EVA J. MILLER *et al.*,
Respondents.¹

Appeal from a judgment of the superior court for King county, Myers, J., entered January 2, 1912, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to obtain the construction of a will. Affirmed.

Tucker & Hyland, for appellants.

Bo Sweeney, for respondents.

ON REHEARING.

PER CURIAM.—The court has considered this case upon rehearing, and the majority of the court adhere to the opinion as reported in 69 Wash. 456, 125 Pac. 974, and for the reasons there given, the judgment should be affirmed.

[No. 10436. *En Banc*. August 6, 1913.]

FLORESTINE PERRAULT, *Respondent*, v. EMPORIUM DEPARTMENT STORE
COMPANY, *Appellant*.²

Appeal by defendant from an order of the superior court for Yakima county, Grady, J., entered December 20, 1911, granting plaintiff a new trial on the ground of inadequate damages, after a verdict of the jury rendered in favor of the plaintiff, in an action for injuries sustained in a passenger elevator in a department store. Affirmed.

Englehart & Rigg, for appellant.

ON REHEARING.

PER CURIAM.—The court has considered this case upon rehearing, and the majority of the court adhere to the opinion as reported in 71 Wash. 523, 128 Pac. 1049, and for the reasons there given, the judgment should be affirmed.

¹Reported in 134 Pac. 189.

²Reported in 134 Pac. 189.

[No. 10119. *En Banc*. August 7, 1913.]

ANDREW STONE, *Respondent*, v. CHRIS T. SYLLIAASEN *et al.*,
Appellants.¹

Appeal from a judgment of the superior court for King county, Prigmore, J., entered June 10, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in the construction of a building. Affirmed.

Hughes, McMicken, Dovell & Ramsey, Otto B. Rupp, and J. B. Joujon-Roche, for appellants.

Jno. Mills Day and *M. E. Brewer*, for respondent.

ON REHEARING.

PER CURIAM.—The court has considered this case upon rehearing and the majority of the court adhere to the opinion as reported in 70 Wash. 89, 126 Pac. 84, and for the reasons there given, the judgment should be affirmed.

[No. 10645. *En Banc*. August 9, 1913.]

JAMES R. ATKESON *et al.*, *Respondents*, v. JACKSON ESTATE,
Appellant.²

Appeal from a judgment of the superior court for King county, Main, J., entered May 29, 1912, upon findings in favor of the plaintiff, in an action for wrongful death. Affirmed.

John W. Roberts (Ramey & Smith, of counsel), for appellant.

A. R. Rutherford and *Milo A. Root*, for respondents.

ON REHEARING.

PER CURIAM.—The court has considered this case upon rehearing, and the majority of the court adhere to the opinion as reported in 72 Wash. 233, 130 Pac. 102, and for the reasons there given, the judgment should be affirmed.

¹Reported in 134 Pac. 189.

²Reported in 134 Pac. 175.

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Argument and conduct of counsel at trial in criminal prosecution, see **CRIMINAL LAW**, 4.

Allowance of counsel fees in divorce proceedings, see **DIVORCE**, 3.

Fees of attorney employed by executor or administrator, see **EXECUTORS AND ADMINISTRATORS**, 6.

Duty of owner to settle with lien claimants before judgment, to mitigate damages by saving attorney's fees, see **INDEMNITY**, 3.

Argument and conduct of counsel at trial of civil action, see **TRIAL**, 1, 2.

AUTHORITY:

Of council to amend or repeal referendum ordinance, see **MUNICIPAL CORPORATIONS**, 3.

Of city to abolish office, see **MUNICIPAL CORPORATIONS**, 7, 8.

Of officers in making overpayment to contractor, see **MUNICIPAL CORPORATIONS**, 15.

Of agent, see **PRINCIPAL AND AGENT**.

AUTOMOBILES:

Injury from collision on highway, see **HIGHWAYS**, 3, 4.

Liability of owner for injury to third person, see **MASTER AND SERVANT**, 21-23.

Injury from collision with in city street, see **MUNICIPAL CORPORATIONS**, 24.

AWARD:

See ARBITRATION AND AWARD.

In condemnation proceedings, see EMINENT DOMAIN.

Grant of application to purchase tide lands, finality, see PUBLIC LANDS, 4.

BALLOTS:

Malconduct of officers in counting ballots, right to recount, see ELECTIONS.

BAR:

Of action by former adjudication, see JUDGMENT, 5-7.

Statute as bar to defense against tax title, see LIMITATION OF ACTIONS.

BENEFICIAL ASSOCIATIONS:

1. BENEFICIAL ASSOCIATIONS—PROPERTY—SECESSION OF LODGE. The property and funds of a benevolent association which are required by the constitution and laws of the order to be held as a trust fund for specified purposes cannot, by a secession of a subordinate lodge receiving its charter from the general order, be diverted to other purposes without the unanimous consent of the members of the order. *Grand Court of Washington, Foresters of America v. Hodel*..... 314

BENEFITS:

To property from improvement, see MUNICIPAL CORPORATIONS, 17.

BILL OF EXCEPTIONS:

As part of record on appeal, see APPEAL AND ERROR, 9.

BILL OF EXCHANGE:

Acceptance in writing, see BILLS AND NOTES, 1.

BILLS AND NOTES:

Premature action to recover installment on note, see ACTION.

Alteration of note, see ALTERATION OF INSTRUMENTS, 1, 2.

Personal liability of officers signing note, see CORPORATIONS, 8.

Guaranty of note, see GUARANTY.

Taking promissory note as waiver of lien, see MECHANICS' LIENS, 3.

Indorsement of purchase price notes as collateral, effect on right to rescind, see VENDOR AND PURCHASER, 2.

1. BILLS AND NOTES—BILL OF EXCHANGE—ACCEPTANCE—ORDERS—STATUTES—CONSTRUCTION. An order by an employee in a mine authorizing the employer to deduct one dollar per month from the monthly wage to pay for the services of Dr. S., as mine physician, is a bill of exchange, upon which there is no liability until accepted in writing under Rem. & Bal. Code, § 3516, providing that a bill of exchange is an unconditional signed order requiring the drawer to

BILLS AND NOTES—CONTINUED.

pay money to order or bearer, and Id., §§ 3517 and 3522, providing that the drawee is not liable unless he accepts the same in writing.

Sheets v. Coast Coal Co...... 327

2. **BILLS AND NOTES—INDORSEMENT—CONDITIONAL DELIVERY—ANSWER—SUFFICIENCY.** In an action against the indorsers of a note, it is a good defense as against the payee that the defendants indorsed the note on condition that the payee would secure additional indorsers before the note should be binding on them, which the payee agreed but failed to do; and an answer setting up such facts sufficiently pleads a conditional delivery of the note. *Seattle National Bank v. Becker* 431

3. **BILLS AND NOTES—BONA FIDE PURCHASERS—HOLDER IN DUE COURSE ACTUAL NOTICE—PARTICIPATION IN ALTERATION.** A bank to whom a note was offered for discount, is not a holder in due course without notice of a material alteration, within the negotiable instruments act, Rem. & Bal. Code, § 3514, where it was a party to and participated in the alteration by insisting upon the indorsement of a fictitious payment reducing the principal sum, as a condition to acceptance and discount. *Washington Finance Corporation v. Glass*..... 653

BONA FIDE PURCHASER:

See JUDGMENT, 8.

Of bill of exchange or promissory note, see **BILLS AND NOTES**, 3.

Of goods, see **SALES**, 2.

Of lands, see **VENDOR AND PURCHASER**, 12.

BONDS:

Supersedeas bond on appeal, see **APPEAL AND ERROR**, 8.

Guaranteeing dividends on stock, see **CORPORATIONS**, 7.

County bonds, submission to vote, see **COUNTIES**.

Indemnity against mechanics' lien, see **MECHANICS' LIENS**, 1.

Delivery to contractor in payment for work, see **MUNICIPAL CORPORATIONS**, 14, 15.

Sureties on bonds, see **PRINCIPAL AND SURETY**.

Investment of school funds in capitol building bonds, see **SCHOOLS AND SCHOOL DISTRICTS**, 1.

Capitol building bonds, see **STATES**.

1. **BONDS—CONSTRUCTION—JOINT OR SEVERAL LIABILITY—SUBROGATION OF SURETY.** Where an injunction bond was given by various lumber companies, as interveners, in a suit in which a temporary injunction issued restraining the defendant railroad companies from putting into effect a schedule of increased freight rates, and the bond was conditioned that the interveners "shall severally repay to the defendants severally upon the several shipments" of the interveners, such increase in rates as may be adjudged to be lawfully chargeable, the bond does not create a joint liability for the in-

BONDS—CONTINUED.

creased freight found by the court to be lawful, but each shipper was severally liable only for the amount due on its own shipments; hence the subrogation of the surety on the bond under Rem. & Bal. Code, § 978, must be in severalty against the shippers found liable, especially in view of the fact that the several interveners were strangers to each other as far as business relations were concerned, and had no interest in common other than securing the injunction. *Northern Pac. R. Co. v. Fidelity and Deposit Co.*..... 543

BOUNDARIES:

1. **BOUNDARIES — LOCATION—PRIMA FACIE CASE—EVIDENCE — SUFFICIENCY.** In a controversy over the location of a common boundary line, evidence of a witness that a post was by general reputation supposed to be on the section line, does not necessarily establish *prima facie* the true location of the section line. *Hope v. Brown*..... 421

BREACH:

Of contract, see **CONTRACTS; VENDOR AND PURCHASER.**
Interest in action for breach of regrading contract, see **INTEREST.**
Of contract of sale, see **SALES, 1.**

BROKERS:

Oral contract for commissions, see **FRAUDS, STATUTE OF, 1-3.**

1. **BROKERS—COMMISSIONS — CONTRACTS — PERFORMANCE—"SALE."** A broker, having a contract for the exclusive sale of a large tract of residence property on commission, did not make a sale entitling him to commissions, where, in the hope of inducing sales of the balance of the property, he procured a building company to enter into a contract to draw plans for and put up ten residences under a co-operative plan, work on which was to proceed only on the sale of each successive lot to third parties, and no present title passed, the owner merely agreeing to pass title to the building company in order to secure a loan for fifty per cent of the cost of the buildings, give a second mortgage, and make sales to third parties, no such sales being made by the broker and the second contract not providing for the payment of commissions; since the execution of the second contract *ipso facto* withdrew the property specified from the operation of the first contract, without effecting any sale thereof. *Orr Co. v. Interlaken Land Co.*..... 340
2. **SAME—CONTRACTS—FRAUDS, STATUTE OF.** Under Rem. & Bal. Code, § 5289, providing that a contract for a broker's commission on the sale of real estate must be in writing, a broker is not entitled to commissions unless the writing determines the amount of the agreed upon commissions without resort to parol testimony. *Orr Co. v. Interlaken Land Co.*..... 340

BROKERS—CONTINUED.

3. **BROKERS—CONTRACTS—COMMISSIONS—EVIDENCE—SUFFICIENCY.** The evidence fails to establish a contract to pay a broker's commissions on the sale of box shooks, where the broker could not show any specific agreement with the seller for the payment of commissions, nor any course of dealing from which a promise to pay could be clearly implied, the writings clearly negated any such idea, and the contract rested entirely in a telephone conversation which was either disputed or misunderstood. *Morrison Mill Co. v. American Mercantile Co.*..... 452
4. **BROKERS—COMMISSIONS—CONTRACT—EVIDENCE—SUFFICIENCY.** In an action to recover a broker's commission on the sale of corporate stock, a nonsuit is proper, where the weight of the evidence was to the effect that a commission was to be paid by others than the defendant, and only in case a sale was made in excess of fifty per cent of the par value, but that no such sale was made, and that the defendant was not interested in the sale and had not agreed to pay the commission. *Orr v. Schwager & Nettleton*..... 631
5. **BROKERS—ACTIONS—ISSUES AND PROOF—JUDGMENT.** In an action upon a written contract for a broker's commission, where the contract sued on was admitted and defendants' affirmative defense of a subsequent modification was not sustained, it is error for the court to grant judgment for the amount it considers reasonable for the services rendered, rather than for the specific sum agreed upon. *Gerard-Fillio Co. v. McNair*..... 368

BUILDING CONTRACTS:

See **CONTRACTS**, 7, 8, 11.

Duty of owner to settle with lien claimants before judgment to mitigate damages, see **INDEMNITY**, 3.

Guaranteeing performance of, see **PRINCIPAL AND SURETY**.

BUILDINGS:

Removal by tenant, see **LANDLORD AND TENANT**, 5.

BULK STOCK LAWS:

Sale of stock in bulk, see **FRAUDULENT CONVEYANCES**, 1.

BURDEN OF PROOF:

See **PLEADING**.

To show title, see **EJECTMENT**.

Insanity as defense, see **HOMICIDE**, 1.

CANCELLATION OF INSTRUMENTS:

Rescission of stock subscription agreement, see **CORPORATIONS**, 4, 5.

Rescission of contract, see **SALES**, 2; **VENDOR AND PURCHASER**, 2-8.

Setting aside tax deed, see **TAXATION**, 1, 2, 5, 6.

CAPITAL:

Of corporations in general, see **CORPORATIONS**, 6.

CARRIERS:

1. **CARRIERS—RATE REGULATIONS—CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS—CRIMINAL PROSECUTIONS—EXCESSIVE PENALTIES.** Laws 1911, p. 558, § 25, providing that no street railroad company shall charge or collect more than five cents for one continuous ride within the city limits, and *Id.*, p. 606, § 95, making it a gross misdemeanor for any officer or agent to violate the law or fail to comply with any order of the railway commission, punishable under Rem. & Bal. Code, § 2267, by imprisonment for not more than one year, or by a fine of not more than \$1,000, or by both, is unconstitutional as being a denial of the equal protection of the laws in that the company may only have a hearing upon a claim of the unconstitutionality of the statute at the risk of such heavy and successive penalties as to amount to intimidation and foreclose its right to litigate the question. *State v. Crawford*..... 248

CAVEAT EMPTOR:

See **VENDOR AND PURCHASER**, 5, 6.

CEMETERIES:

Purchase by city of land for, see **MUNICIPAL CORPORATIONS**, 25, 26.

CERTIFICATE:

Mandamus to compel judge to certify proper statement of facts, see **APPEAL AND ERROR**, 12.

Tax certificate, see **TAXATION**, 3.

CERTIORARI:

Review of order of state court substituting new guardian *ad litem*, see **REMOVAL OF CAUSES**.

1. **CERTIORARI—WHEN LIES—ADEQUACY OF REMEDY BY APPEAL.** The remedy by appeal from an order refusing to extend the time within which to file a statement of facts in a case pending on appeal, is inadequate and hence certiorari lies; since the appeal could not be heard until after the time for filing a statement of facts had expired under Rem. & Bal. Code, § 393, fixing the utmost limit at ninety days after the date of final judgment. *State ex rel. Sefrit v. Superior Court*..... 601

CHANGE OF VENUE:

Of civil actions, see **VENUE**.

CHARGE:

To jury in criminal prosecutions, see **CRIMINAL LAW**, 5-7, 10.

To jury in civil actions, see **TRIAL**, 6, 7.

CHARTER:

Of municipal corporation, see **MUNICIPAL CORPORATIONS**, 1-3, 5, 6, 11-13, 28, 30, 31.

CHILD:

See **GUARDIAN AND WARD**.

Custody of children on divorce, see **DIVORCE**, 7-9.

Guardian *ad litem* for, see **INFANTS**.

Liability of parent for negligent driving of automobile by child, see **MASTER AND SERVANT**, 23.

CITIES:

See **MUNICIPAL CORPORATIONS**.

CIVIL SERVICE:

See **MUNICIPAL CORPORATIONS**, 6-9.

CLAIMS:

Against city presenting, see **MUNICIPAL CORPORATIONS**, 27-31.

COLLATERAL ATTACK:

On final distribution of estate, see **EXECUTORS AND ADMINISTRATORS**, 2.

On judgment, see **JUDGMENT**, 4.

COLLEGES AND UNIVERSITIES:

Disposal of university lands, see **PUBLIC LANDS**, 1-3.

1. **COLLEGES AND UNIVERSITIES — LANDS — DISPOSAL—POWERS OF REGENTS—STATUTES—IMPLIED REPEAL.** Laws 1862-63, p. 477, incorporating the board of regents of the university, in so far as it empowers the regents as a body corporate to hold and acquire real estate, is a mere definition of the powers of the board of regents, and is impliedly repealed by the whole course and tenor of subsequent repugnant legislation accomplishing a unified system of control of all public lands, whereby the state board of land commissioners is given full supervision and control and power of disposition of all public lands now or hereafter owned by the state and not appropriated by law to any specific public use (Laws 1893, p. 387, § 5; Laws 1895, p. 527; Laws 1897, p. 229; and Rem. & Bal. Code, §§ 4316-4330); especially in view of the fact that the later acts defined the duties of the board of regents with great particularity, without including the power to hold real estate; the regents being mere agents of the state with no vested rights in the subject-matter of their agency. *State v. Hewitt Land Co.*..... 573
2. **COLLEGES AND UNIVERSITIES—LANDS—POWER OF DISPOSAL—STATUTES—CONSTRUCTION.** No provision of law having conferred power on the territorial board of regents of the university to sell university lands, and that power being later conferred upon the state

COLLEGES AND UNIVERSITIES—CONTINUED.

board of land commissioners, the fact that the state constitution provides for the confirmation of all lands "theretofore" sold by the university commissioners, and that the legislature passed such a confirmatory act (Laws 1890, p. 448), indicates the purpose and intent of the people and legislature to take from the regents all future power to dispose of university lands. *State v. Hewitt Land Co.* 573

3. **COLLEGES AND UNIVERSITIES—LANDS—DISPOSAL—"SPECIFIC PUBLIC USE"—STATUTES—CONSTRUCTION.** Laws 1893, p. 387, § 5, conferring upon the state board of land commissioners the control and power to dispose of all public lands "not appropriated to any specific public use" means lands not occupied, employed or used by the state in the performance of some of its public functions; hence applies to unoccupied university lands, situated fifty miles from the site of the university and not necessary to the present uses of the university or the board in the performance of any of its functions. *State v. Hewitt Land Co.*..... 573

COLLISION:

Between automobiles, see HIGHWAYS, 3, 4; MUNICIPAL CORPORATIONS, 24.

COMMISSIONS:

Of broker, see BROKERS.

Oral contract for broker's commissions, see FRAUDS, STATUTE OF, 1-3.

COMMON CARRIERS:

See CARRIERS.

COMMUNITY DEBT:

See JUDGMENT, 8.

COMMUNITY PROPERTY:

See HUSBAND AND WIFE, 3-5, 7.

COMPENSATION:

Of broker, see BROKERS.

For performance of contract, see CONTRACTS, 5.

Of attorney in divorce suit, see DIVORCE, 3.

For property taken or damaged for public use, see EMINENT DOMAIN.

Of attorney in settlement of estate, see EXECUTORS AND ADMINISTRATORS, 6.

Of attorney in foreclosure of liens, see INDEMNITY.

Minimum wage paid by contractors on local improvement, see MUNICIPAL CORPORATIONS, 11.

Claims for compensation for property taken for public use, see MUNICIPAL CORPORATIONS, 27, 28.

COMPETENCY:

Of experts as witnesses, see EVIDENCE, 4.

Of witnesses in general, see WITNESSES, 1.

COMPETITION:

Unfair use of trade-name, see TRADE-MARKS AND TRADE-NAMES.

COMPLAINT:

In criminal prosecutions, see INDICTMENT AND INFORMATION.

COMPROMISE AND SETTLEMENT:

Settlement agreement between debtor and trustee for creditors, see CONTRACTS, 1, 4, 9.

Of claim for personal injuries, see RELEASE.

CONCLUSION:

Of witness, see EVIDENCE, 4.

CONCLUSIVENESS:

Of condemnation award, see EMINENT DOMAIN, 6.

Of judgment, see JUDGMENT, 4-7.

CONDEMNATION:

Taking or damaging property for public use, see EMINENT DOMAIN.

CONDITIONAL SALES:

See SALES, 2-4.

CONDITIONS:

In contracts, see CONTRACTS, 3.

Precedent to action against city for damages, see MUNICIPAL CORPORATIONS, 28-30.

CONDUCT:

Misconduct of judge as harmless error, see CRIMINAL LAW, 9.

Of counsel at trial of civil action, see TRIAL, 1, 2.

CONFESSION:

Admissibility in evidence, see CRIMINAL LAW, 2.

Right to read to jury in closing argument, see CRIMINAL LAW, 4.

CONSIDERATION:

In deed, see DEEDS.

CONSOLIDATION:

Of school districts, see SCHOOLS AND SCHOOL DISTRICTS, 2.

CONSPIRACY:

Declaration of conspirator as evidence, see CRIMINAL LAW, 1.

CONSTITUTIONAL LAW:

- Penalty for violation of rate regulation by street railroad as denial of equal protection of laws, see **CARRIERS**.
- Uniformity of tax, see **LICENSES**, 2.
- Limitation of state indebtedness, see **STATES**.

CONSTRUCTION:

- Of statute defining abortion, see **ABORTION**.
- Of statute relating to bills of exchange, see **BILLS AND NOTES**, 1.
- Of injunction bond, see **BONDS**.
- Of statutes relating to control and disposal of public lands, see **COLLEGES AND UNIVERSITIES**.
- Of contracts, see **CONTRACTS**, 2-6.
- Of statute defining common gambler, see **GAMING**.
- Of writing as guaranty, see **GUARANTY**.
- Of indemnity contract, see **INDEMNITY**, 2.
- Of statutes relating to criminal libel, see **LIBEL AND SLANDER**, 1.
- Of statute authorizing city of first class to grant licenses, see **LICENSES**.
- Of statute relating to waiver of lien by taking note as payment, see **MECHANICS' LIENS**, 3.
- Of statutes regulating hours of service of employees, see **MUNICIPAL CORPORATIONS**, 4, 5.
- Of charter amendment fixing minimum wage on local improvement work, see **MUNICIPAL CORPORATIONS**, 11.
- Of contract for public improvement, see **MUNICIPAL CORPORATIONS**, 14.
- Of laws relating to disposal of university lands, see **PUBLIC LANDS**, 1.
- Of laws providing for consolidation of school districts, see **SCHOOLS AND SCHOOL DISTRICTS**, 2.
- Of contract for purchase and sale of land, see **VENDOR AND PURCHASER**, 1.

CONTEMPT:

- For failure to pay alimony, see **DIVORCE**, 6.
- Preventing enforcement of proceedings, see **PROHIBITION**.

CONTEST:

- Of election, see **ELECTIONS**.

CONTINUANCE:

1. **CONTINUANCE—NEW TRIAL—GROUNDS—SURPRISE.** It is not ground for a continuance or a new trial that plaintiff was surprised by the testimony of one of the opposing parties, called by him as a witness to prove one of the issues, who testified substantially as he had pleaded, and any newly discovered evidence would merely impeach or discredit the witness. *Orr v. Schwager & Nettleton*..... 631

CONTRACTORS:

- Indemnity insurance, losses covered, see **INSURANCE**, 2.
- Liability on indemnity bond, see **MECHANICS' LIENS**, 1.
- On public improvements, see **MUNICIPAL CORPORATIONS**, 11, 14-16.

CONTRACTS:

- See **BILLS AND NOTES**; **CORPORATIONS**, 6-8; **COVENANTS**; **DEEDS**; **GUARANTY**; **HUSBAND AND WIFE**; **INDEMNITY**; **INSURANCE**; **MONEY LENT**; **MONEY PAID**; **SALES**.
 - Alteration, see **ALTERATION OF INSTRUMENTS**.
 - Submission to arbitration, see **ARBITRATION AND AWARD**.
 - Employment of broker, see **BROKERS**.
 - Agreements within statute of frauds, see **FRAUDS, STATUTE OF**.
 - Effect of official interest on umpire's decision as to provisions of, see **HIGHWAYS**, 2.
 - Allowance of interest in action for breach of, see **INTEREST**.
 - Leases, see **LANDLORD AND TENANT**.
 - Employment, see **MASTER AND SERVANT**, 1, 2.
 - For public improvements, see **MUNICIPAL CORPORATIONS**, 14, 15, 30, 31.
 - Claims against city for breach of, see **MUNICIPAL CORPORATIONS**, 30, 31.
 - Suretyship, see **PRINCIPAL AND SURETY**.
 - Releasing claim for personal injuries, see **RELEASE**.
 - Specific performance, see **SPECIFIC PERFORMANCE**.
 - Usurious contracts, see **USURY**.
 - Sales of realty, see **VENDOR AND PURCHASER**.
1. **CONTRACTS—MUTUALITY.** A settlement agreement between a failing debtor and a trustee for creditors is not lacking in mutuality, where it appears that it was agreed that the trustees should obtain assignments of the merchandise claims, and that pending bankruptcy proceedings should be dismissed and the debtor put in possession of the stock of goods, which was done. *Taylor v. Ewing*... 214
 2. **CONTRACTS—CONSTRUCTION.** A contract agreeing to convey specified portions of a tract of land in consideration of clearing the tract does not entitle the contractor to "shore lands" in front of his portion of the tract. *Richardson v. Sears*..... 499
 3. **CONTRACTS—CONDITIONS—SPECIFICATIONS.** Conditions in specifications attached to a contract declaring that the contract is made subject thereto, are part of the contract, where they were understood by the parties at the time of entering into the contract. *State ex rel. Noble v. Bowlby*..... 54
 4. **CONTRACTS—CONSTRUCTION—EVIDENCE—SUFFICIENCY.** A settlement agreement between a failing debtor and a trustee for creditors whereby the trustee agreed to get assignments of the claims, held, on conflicting evidence, to cover only merchandise claims, where the debtor's attorney objected to the only claim other than merchandise

CONTRACTS—CONTINUED.

- claims as having been paid and being "for rent." *Taylor v. Ewing* 214
5. CONTRACTS—MEDIUM OF PAYMENT—CONSTRUCTION. A contract for the clearing of land providing that the contractor is to be compensated at the rate of \$125 per acre by having conveyed to him a portion of the land at the valuation of \$700 per acre, does not leave it optional with the owners to pay either in money or land; especially where further provisions gave the owners a lien on the contractor's portion of the land for rent falling due, and prevented him from erecting structures thereon which would be nuisances in the neighborhood. *Richardson v. Sears*..... 499
6. CONTRACTS—CONSTRUCTION—LIABILITY. An applicant for a loan is liable on his agreement to pay the expense incurred in making it, although the loan was not completed, due to his failure to procure the abstract and complete the loan. *Knuppenberg v. Lee*..... 636
7. CONTRACTS — BUILDING CONTRACTS — EXTRAS — WRITTEN ORDERS OF ARCHITECT—NECESSITY. The owners are not liable for extras orally agreed to by the architect, acting as the owners' agent, where the owners did not agree to or have any knowledge thereof, and the building contract provided that no alterations should be made except upon a written order of the architect. *Wiley v. Hart*..... 142
8. CONTRACTS — BUILDING CONTRACTS — DEMURRAGE — IMPRACTICABLE APPORTIONMENT OF DAMAGES. Nothing can be allowed under a demurrage clause in a building contract for failure to complete the building on time, where it appears that, while the contractors were dilatory, a considerable portion of the delay was due to the acts of the architect, as agent of the owners, and also to the fault of the owners in not completing the building sooner after taking possession, making it impracticable to apportion the damages. *Wiley v. Hart* 142
9. CONTRACTS—PERFORMANCE OR BREACH. A settlement agreement between a failing debtor and a trustee for creditors whereby the trustee agreed to secure assignments of all merchandise claims, is substantially performed, where it appears that there were claims of more than forty creditors residing in many states aggregating \$12,000, and assignments were procured of all claims except one for \$366.67 which was procured by wire during the progress of the trial, and one for \$48 the amount of which was tendered and paid into court. *Taylor v. Ewing*..... 214
10. CONTRACTS—PERFORMANCE OR BREACH—FORFEITURE—WAIVER. The right to forfeit a contract whereby plaintiff was to clear land by May 1st, 1905, receiving a specified portion of the land as pay for his services, is waived where the owners acquiesced in delay and encouraged the continuance of the work until November 1908, when

CONTRACTS—CONTINUED.

the work was practically finished and the land had greatly increased in value, at all times allowing plaintiff and persons advancing money to him for the work to understand that the contract was still in force. *Richardson v. Sears*..... 499

11. **CONTRACTS — EVIDENCE OF DAMAGE — CERTIFICATE OF ARBITRATOR.** Where a building contract provided that if the building was completed by the owner, the affidavit of the auditor as to the cost thereof shall be taken as final between the parties, the affidavit is admissible to prove the amount of the owner's damages. *Bird v. Steele*... 68

CONTRIBUTORY NEGLIGENCE:

Of servant, see **MASTER AND SERVANT**, 10, 14-16.

Of owner of lot injured by slide caused by improvement, see **MUNICIPAL CORPORATIONS**, 18.

Of person injured on street, see **MUNICIPAL CORPORATIONS**, 24.

CONTROL:

By court over guardian *ad litem*, see **INFANTS**.

CONVEYANCES:

See **DEEDS**; **HUSBAND AND WIFE**, 4-6; **MORTGAGES**.

Of property pending condemnation, see **EMINENT DOMAIN**, 4.

In fraud of creditors, see **FRAUDULENT CONVEYANCES**.

Of state lands, see **PUBLIC LANDS**.

Contracts to convey, see **VENDOR AND PURCHASER**.

CORPORATIONS:

See **MUNICIPAL CORPORATIONS**.

1. **CORPORATIONS—STOCK—SUBSCRIPTIONS—FRAUD.** The fact that a subscriber to capital stock gave his note and assigned stock to an existing corporation by name, does not estop him from asserting that his subscription was fraudulently induced by representations that the company was to be subsequently formed by certain persons in whom he had confidence. *Johns v. Coffee*..... 189
2. **CORPORATIONS—STOCK—SUBSCRIPTIONS—FRAUD—LIABILITY TO CREDITORS.** Where a stockholder was induced to subscribe for stock by the fraudulent representations of the corporation, and promptly rescinded, he is not liable to creditors for the balance due upon the stock, as he is himself a creditor and stands on an equal footing with other creditors. *Johns v. Coffee*..... 189
3. **SAME—STOCK — SUBSCRIPTIONS — FRAUD—LACHES.** Where a subscriber inquired of the vice president and agent and was informed that he was subscribing to a corporation to be thereafter formed by certain men, neither the corporation nor its receiver can complain

CORPORATIONS—CONTINUED.

- that he was guilty of laches in not ascertaining the falsity of the representations. *Johns v. Coffee*..... 189
4. CORPORATIONS—STOCK—SUBSCRIPTIONS—FRAUD—RESCISSION — NOTICE. Where a stock subscription was induced by the fraud of the corporation, rescission may be effected by timely notice to the officers, without taking steps to withdraw from the list of stockholders, as against subsequent creditors who did not deal with the corporation on the faith of the subscription list, and had no knowledge thereof. *Johns v. Coffee*..... 189
5. SAME—STOCK—SUBSCRIPTIONS—FRAUD — RESCISSION — DEFENSES. Upon the rescission of a stock subscription for fraudulently representing that the corporation was to be formed and controlled by certain men, it cannot be shown in defense that other stock of equal value was issued to the subscriber. *Johns v. Coffee*..... 189
6. CORPORATIONS—DIVIDENDS—PAYMENT FROM CAPITAL. An agreement by a corporation, in consideration of the sale of stock, to guarantee the payment of \$1,000 in dividends within eighteen months, is void, where there were no net profits, since to enforce it would contravene public policy and violate Rem. & Bal. Code, § 3697, making it unlawful to declare dividends except out of net profits or to reduce its capital stock by paying any portion of it to its stockholders. *Jorguson v. Apex Gold Mines Co.*..... 243
7. SAME—GUARANTEEING DIVIDENDS. A bond by a corporation guaranteeing dividends in a sum equal to the amount paid for the stock, makes the stock subscription a fictitious one and violates Const., art. 12, § 6, prohibiting the issue of stock except to *bona fide* holders for full value. *Jorguson v. Apex Gold Mines Co.*..... 243
8. CORPORATIONS—REPRESENTATION—BILLS AND NOTES—EXECUTION — REPRESENTATIVE CAPACITY OF MAKERS—PAROL EVIDENCE. The officers of a corporation who sign a note reading that "We" promise to pay, without stating in the note or signatures the manner or capacity in which they act, are jointly personally liable and cannot be heard to say that they signed only as officers of the corporation, which received the consideration, where there is no ambiguity in the language of the note itself. *Toon v. McCaw*..... 335
9. CORPORATIONS—ACTIONS — VENUE — JURISDICTION. Under Rem. & Bal. Code, § 206, providing in what counties an action may be brought against a corporation, the court has no jurisdiction to enter judgment where the action was brought in the wrong county. *Richman v. Wenaha Co.*..... 370
10. CORPORATIONS—INSOLVENCY—EVIDENCE. The insolvency of an insurance company is not established by the fact that it was in need of ready money to meet its fire losses, and had no way of proceed-

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ing except by calling in its stock subscriptions, upon which only one-half had been paid. *Johns v. Coffee*..... 189

CORROBORATION:

Of defendant as to self-defense, see **HOMICIDE**, 2.

Of prostitute in prosecution for accepting earnings of, see **PROSTITUTION**, 3.

COSTS:

1. **COSTS—ON APPEAL—DISCRETION.** Where there are cross-appeals, and both sides are in a measure successful, costs on appeal are discretionary under Rem. & Bal. Code, § 1744, and may not be allowed to either party. *Wiley v. Hart*..... 142
2. **COSTS — ON APPEAL — APPORTIONMENT.** Where a judgment for plaintiff is affirmed as to one of the defendants and reversed as to the other defendant and wife, all the defendants appearing by the same counsel, the costs on appeal are properly apportioned by allowing the plaintiff one-half of his costs against the defendant held liable, and allowing the other defendant and wife one-half of their costs against the plaintiff. *Thomas v. Lee*..... 286

COUNCIL:

See **MUNICIPAL CORPORATIONS**, 1-3, 12.

COUNTIES:

1. **COUNTIES — BONDS — ELECTION— SUBMISSION—SINGLE PROPOSITION.** An election authorizing a county bond issue for the construction of various highways and bridges is not invalid as the submission of distinct and unrelated objects as a single proposition, where it embraced a comprehensive system of county roads and bridges, although some of the roads were on islands separated from its companion parts on the mainland; since that does not destroy the unity of the system. *Aylmore v. Hamilton*..... 433
2. **SAME—BONDS—VALIDATION.** The submission of a bond issue for the construction of various county roads and bridges as a single proposition is validated by Laws 1913, p. 63, expressly so providing, where the county commissioners shall find that the proposition has for its object the construction of a system of county highways, and validating any such bonds where the submission would have been authorized under the act, if submitted at any time within one year prior to the taking effect of the act. *Aylmore v. Hamilton*..... 433

COURTS:

Review of decisions, see **APPEAL AND ERROR**; **CERTIORARI**.

Law of case as precluding grant of mandamus by supreme court, see **APPEAL AND ERROR**, 26.

COURTS—CONTINUED.

- Jurisdiction and venue of action against corporation, see CORPORATIONS, 9.
- Probate proceedings, see EXECUTORS AND ADMINISTRATORS.
- Appointment and control over guardian *ad litem*, see INFANTS.
- Mandamus to courts, see MANDAMUS, 1, 3.
- Review of method of improving streets, see MUNICIPAL CORPORATIONS, 10.
- Review of assessment proceedings, see MUNICIPAL CORPORATIONS, 20.
- Preventing enforcement of orders, see PROHIBITION.
- Removal of action from state court to United States court, see REMOVAL OF CAUSES.
- Province of court and jury, see TRIAL, 4, 5.

COVENANTS:

- Independent covenants in land contract, see VENDOR AND PURCHASER, 1.
- 1. COVENANTS—SPECIAL WARRANTY—EFFECT—TAX TITLE. A conveyance by special warranty deed warranting the title against acts done by the grantor, imposes the duty of paying the delinquent taxes accruing while the owner of the land, or at least of notifying the grantee of an outstanding certificate when served with summons in an action to foreclose the tax. *Collins v. Hoffman*..... 264

CREDIBILITY:

- Of witness, see WITNESSES, 2-4.

CREDITORS:

- Conveyances in fraud of, see FRAUDULENT CONVEYANCES.

CREDITS:

- To executor on final settlement of estate, see EXECUTORS AND ADMINISTRATORS, 3-5.

CRIMINAL LAW:

- See ABORTION; GAMING; HOMICIDE; LIBEL AND SLANDER.
- Prosecution for violation of rate regulation by street railroad, see CARRIERS.
- Indictment, information, or complaint, see INDICTMENT AND INFORMATION.
- Accepting earnings of prostitute, see PROSTITUTION.
- Impeaching testimony of prosecutrix, see WITNESSES, 2-4.
- 1. CRIMINAL LAW—EVIDENCE—DECLARATION OF CONSPIRATOR. In a prosecution of two persons in which there was sufficient evidence that they were acting in concert with a common criminal design, evidence is admissible of a conversation between the prosecuting

CRIMINAL LAW—CONTINUED.

- witness and one of the defendants when the other was not present. *State v. Pettit*..... 510
2. CRIMINAL LAW—EVIDENCE OF CONFESSION—ADMISSIBILITY OF ORAL CONFESSION. Where a confession was written down in longhand in the presence of the defendant and read over to him and its truth acknowledged by parol, it is admissible in evidence the same as if signed by him. *State v. Harris*..... 60
3. CRIMINAL LAW—TRIAL—RIGHT TO OPEN AND CLOSE—DEFENSE OF INSANITY. Where the defense is insanity, the state has the right to open and close, since the main issue is his guilt or innocence, although the defendant has the burden of overcoming the presumption of sanity. *State v. Harris*..... 60
4. CRIMINAL LAW—TRIAL—ARGUMENT. A confession properly admitted in evidence may be read to the jury in the closing argument of counsel. *State v. Harris*..... 60
5. CRIMINAL LAW—TRIAL—ADMISSIONS OF PROSECUTOR. An admission by the prosecuting attorney that a conviction was not expected under one of the alternative charges in the information, does not conclude the court or make it error to instruct the jury thereon; since the court is not controlled by the attitude of the prosecuting attorney. *State v. Pettit*..... 510
6. CRIMINAL LAW—INSTRUCTIONS—PREPONDERANCE OF EVIDENCE. An instruction upon the preponderance of the evidence, to establish insanity, that if the jury are unable to say that they conscientiously believe the defendant was insane, the defendant has failed to establish the defense, and that the jury must find the truth, is erroneous in requiring that the defense be established beyond a reasonable doubt, or by more than the weight of the evidence. *State v. Harris* 60
7. CRIMINAL LAW—INSTRUCTIONS—FLIGHT. An instruction that flight was a material circumstance to be weighed and considered by the jury in connection with all other facts, that the term flight means that there had been a departure from the defendant's abode at the time of the crime due to fear, that it was for the jury to determine whether defendant's departure constituted flight, and if they believed there was a flight, then such fact tends to prove guilt, and must be given such weight as the jury should believe it entitled to, is not, when taken as a whole, objectionable as failing to tell the jury that evidence of flight is not sufficient in itself to establish guilt; since the jury must have understood that it was not. *State v. Pettit*..... 510
8. CRIMINAL LAW—NEW TRIAL. Passion or prejudice, warranting a new trial, is not shown by the fact that the jury believed the evi-

CRIMINAL LAW—CONTINUED.

dence of the state, rather than conflicting evidence for the defense, where there was evidence to establish every element of the crime charged. *State v. Columbus*..... 290

9. **CRIMINAL LAW—TRIAL—APPEAL—HARMLESS ERROR.** The defendant cannot predicate error upon improper conduct of the court in that, on sustaining objections to examination by defendant's counsel, a remark was made suggestive of improper relations of the defendant, when it was not any more so than the objectionable questions. *State v. Neis*..... 280

10. **CRIMINAL LAW—APPEAL—REVIEW—INSTRUCTIONS.** Instructions are not to be reviewed as though standing alone, and are not erroneous if when read with the entire charge the jury were not misled. *State v. Pettit*..... 510

CROSS-EXAMINATION:

See WITNESSES, 2-3.

CUSTODY:

Of child, see DIVORCE, 7-9.

DAMAGES:

For breach of building contract, see CONTRACTS, 8, 11.

For wrongful death, see DEATH.

Compensation for property taken or damaged for public use, see EMINENT DOMAIN.

For fraud, see FRAUD.

For injuries from automobile collision, see HIGHWAYS, 4.

Indemnifying surety in replevin bond for damages suffered, see INDEMNITY, 1, 2.

Duty of owner to mitigate damages on default of contractor, see INDEMNITY, 3.

Allowance of interest in action for damages to property, see INTEREST.

For unlawful entry and general nuisance by landlord, see LANDLORD AND TENANT, 3, 4.

As question for jury, under Federal employers' liability act, see MASTER AND SERVANT, 15.

Injuries caused by public improvements, see MUNICIPAL CORPORATIONS, 16-18, 27, 28, 31.

For private nuisance, see NUISANCE.

Release of claim for, see RELEASE.

For breach of warranty, see SALES, 1.

For trespass, see TRESPASS, 2, 3.

Alternative damages on denial of rescission for deficiency in quantity of land, see VENDOR AND PURCHASER, 6.

1. **DAMAGES—MENTAL SUFFERING.** Recovery may be had for mental suffering which was the result of the wrongful acts of the defendant

DAMAGES—CONTINUED.

in an unlawful entry upon plaintiff's premises, although there was no actual physical injury. *Nordgren v. Lawrence*..... 305

2. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$1,200 for personal injuries is not excessive, where it appears that plaintiff was shot in the arm, the bullet entering below and coming out at the elbow, disabling the plaintiff from following his occupation at \$3 a day for five months, and that he had not fully recovered at the time of the trial, seven months after the shooting, when he was earning but \$2.50 a day. *Pasarel v. Anderson*..... 312
3. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$4,000 for personal injuries, rendered at the second trial of the action, two years after the first trial and four years after the accident, cannot be held excessive because the evidence at the first trial tended to show only temporary injuries, where it was sustained by the evidence at the second trial. *Field v. Spokane, Portland and Seattle R. Co.*..... 356

DEATH:

Of coal miner, cause of death, see **MASTER AND SERVANT**, 5.

Evidence of transactions with person since deceased, see **WITNESSES**, 1.

1. **DEATH—RIGHT OF ACTION—FEDERAL ACT—DAMAGES RECOVERABLE—INSTRUCTION.** In an action for wrongful death under the Federal employers' liability act limiting the recovery by dependent relatives to loss resulting from deprivation of reasonable expectancy of pecuniary benefits, it is error to instruct that the law has no fixed standard by which to ascertain the damages, and that the question to determine was what loss the plaintiffs suffered by reason of the death of the deceased, and that the deceased owed the "legal duty" to support his wife and child (whom he had deserted), and that they were entitled to recover independently of whether or not he contributed anything to their support. *Fogarty v. Northern Pac. R. Co.*..... 397
2. **SAME—DAMAGES—APPORTIONMENT.** In an action under the Federal employers' liability act by a wife and child for the wrongful death of the husband and father, it is error to instruct the jury to assess damages in a single sum; since the recovery depends on the pecuniary loss suffered by each beneficiary. *Fogarty v. Northern Pac. R. Co.*..... 397

DEBT:

Community debt, see **HUSBAND AND WIFE**, 7.

Application of payments, see **PAYMENT**.

State indebtedness, limitation, see **STATES**.

DEBTOR AND CREDITOR:

See **FRAUDULENT CONVEYANCES**.

DECEDENTS:

- Estates, see EXECUTORS AND ADMINISTRATORS.
- Liability of wife for funeral expenses of husband, see HUSBAND AND WIFE, 1, 2.
- Evidence of transactions with, see WITNESSES, 1.

DECEIT:

- See FRAUD.

DECISION:

- Decisions reviewable, see APPEAL AND ERROR, 1.
- On appeal, see APPEAL AND ERROR, 25-28.
- Official interest as affecting decision of umpire, see ARBITRATION AND AWARD.

DECLARATIONS:

- As evidence in criminal prosecutions, see CRIMINAL LAW, 2.

DEDICATION:

1. DEDICATION—PAROL DEDICATION—EVIDENCE—SUFFICIENCY. A parol dedication is not sufficiently established by evidence of alleged statements made by the owner some twenty years before the trial, to the effect that the strip "was an old county road," that he had "taken twenty feet here for a street" or "laid out twenty feet for a driveway," and the plat showed it to be part of a lot with no expressed intention to dedicate. *Maggs v. Seattle*..... 323

DEEDS:

- Covenants in deeds, see COVENANTS.
 - Conveyance by warranty deed pending condemnation, see EMINENT DOMAIN, 4.
 - From husband to wife in fraud of creditors, see FRAUDULENT CONVEYANCES, 2.
 - Conveyance of separate property of spouse, see HUSBAND AND WIFE, 5, 6.
 - Absolute deed as mortgage, see MORTGAGES, 1.
 - Title to vacated streets, effect of deed of abutting lots, see MUNICIPAL CORPORATIONS, 23.
 - Of state lands, see PUBLIC LANDS, 1-3.
 - Tax deeds, vacation, see TAXATION, 1.
1. DEEDS—CONSIDERATION. A deed otherwise regular is valid whether founded on a valuable or a good consideration. *Powers v. Munson* 234

DEFAULT:

- Judgment by, see JUDGMENT, 1-3.
- By vendee, see VENDOR AND PURCHASER, 1-4, 10, 11.

DELAY:

In entry of judgment, see JUSTICES OF THE PEACE, 1.

As affecting right to performance of contract, see SPECIFIC PERFORMANCE, 3, 4.

DELIVERY:.

Of bill of exchange or promissory note, see BILLS AND NOTES, 2.

DEMAND:

For performance of contract, see VENDOR AND PURCHASER, 8.

DEMURRAGE:

For failure to complete building on time, see CONTRACTS, 8.

DENIALS:

In pleading, see PLEADING.

DESCRIPTION:

Of property on tax rolls, see TAXATION, 3.

DESIGNATION:

Of part of judgment appealed from, see APPEAL AND ERROR, 7.

DIRECTING VERDICT:

In civil actions, see TRIAL, 4, 5.

DISCHARGE:

Of guardian, vacation of order, see GUARDIAN AND WARD, 2.

Of lien by taking promissory note, see MECHANICS' LIENS, 3.

From liability as surety, see PRINCIPAL AND SURETY.

Of claim for personal injuries, see RELEASE.

DISCRETION OF COURT:

Extending time for filing statement of facts, see APPEAL AND ERROR, 11.

Allowance of costs on appeal, see COSTS, 1.

Denial of attorney's fees and suit money, see DIVORCE, 3.

Vacation of default judgment, see JUDGMENT, 2, 3.

DISMISSAL AND NONSUIT:

Dismissal of appeal for failure to file statement of facts in time, see APPEAL AND ERROR, 10.

DISPOSAL:

Of university lands, see COLLEGES AND UNIVERSITIES, . .

DISTRIBUTION:

Liability of city on wrongful payment of award, see EMINENT DOMAIN, 3.

Of estate of decedent, see EXECUTORS AND ADMINISTRATORS, 2.

DIVERSION:

Of property on secession of lodge, see **BENEFICIAL ASSOCIATIONS**.

DIVIDENDS:

Payment from capital, see **CORPORATIONS**, 6, 7.

DIVORCE:

Orders appealable as final judgment, see **APPEAL AND ERROR**, 1, 6.

Time for appeal from order for alimony, see **APPEAL AND ERROR**, 6.

1. **DIVORCE—GROUNDS—RENDERING LIFE BURDENSOME—EVIDENCE—SUFFICIENCY.** Under Rem. & Bal. Code, § 982, authorizing a divorce on any grounds deemed sufficient, where the court is satisfied that the parties can no longer live together, the denial of a divorce is unwarranted, where it appears that there is no love between the parties, the defendant's attitude toward his wife has been such as to make her life burdensome, and the parties agree that they can no longer live together, although there was no evidence of quarrels or temper or actual abusive treatment. *Spute v. Spute*..... 665
2. **DIVORCE—APPEAL—REVIEW—FINDINGS.** The action of the trial court in dismissing an action for a divorce in a doubtful case will not be disturbed on appeal, where the evidence is conflicting and the trial court heard and saw the witnesses. *Griffith v. Griffith*. 284
3. **DIVORCE—SUIT MONEY—AMOUNT—DISCRETION.** The discretion of the trial court in denying attorney's fees and suit money in a divorce action, will not be disturbed on appeal except for abuse; and no abuse appears where, on dismissal of the action, the court allowed \$50 attorney's fees and \$25 suit money, there being property worth not to exceed \$5,000 subject to a large indebtedness. *Griffith v. Griffith* 284
4. **DIVORCE—ALIMONY—RIGHT TO.** The wife is entitled to alimony although all the property belonged to the husband at the time of the marriage. *Spute v. Spute*..... 665
5. **DIVORCE—ALIMONY—DECREE—MODIFICATION.** As to alimony yet to accrue, the superior court may modify a decree of divorce as the conditions or circumstances of the parties may change from time to time; but it has no power to modify the decree as to installments of alimony past due and unpaid. *Beers v. Beers*..... 458
6. **DIVORCE—ALIMONY — ENFORCEMENT — CONTEMPT PROCEEDINGS—DEFENSES.** A divorced husband cannot be adjudged guilty of contempt in failing to pay the alimony awarded where it appears by clear and satisfactory evidence that he has neither the means nor the ability to do so. *Boyle v. Boyle*..... 529

DIVORCE—CONTINUED.

7. **DIVORCE—CUSTODY AND SUPPORT OF CHILDREN—MODIFICATION OF DECREE—EVIDENCE—SUFFICIENCY—PARENT AND CHILD.** A decree of divorce, which awarded the custody of a child of tender years to the mother, with provisions for support, having been modified, in 1904, upon the mother's remarriage to a prosperous farmer, so as to relieve the father from payments for support, should not, eight years later, be again modified to compel the father to support and educate the child, where conditions had not materially changed, he had remarried and has a child of his own, and the stepfather is able and willing to provide support as in the past; the duty of a stepfather to support his stepchildren being something more than a mere charity. *White v. McDowell*..... 44
8. **DIVORCE—CUSTODY OF CHILDREN—DECREE—MODIFICATION.** The superior court has power to modify a decree of divorce with reference to the custody of minor children, where there is a material change in the conditions or fitness of the parties, or their welfare would be promoted thereby. *Beers v. Beers*..... 458
9. **SAME—PETITION FOR MODIFICATION—DEMURRER.** A petition to modify a decree of divorce as to the custody of children is sufficient on demurrer to authorize the relief sought, when it appears that the welfare of the children would be promoted thereby. *Beers v. Beers* 458

DOMICILE:

Residence of defendant, see **VENUE**.

DUPLICITY:

In information, see **INDICTMENT AND INFORMATION**, 2, 4.

EARNINGS:

Accepting earnings of prostitute, see **PROSTITUTION**.

Right to on abandonment of lease, see **WHARVES**.

EJECTMENT:

Invoking bar of statute to preclude defense of void tax title, see **LIMITATION OF ACTIONS**.

1. **EJECTMENT—TITLE—EVIDENCE—BURDEN OF PROOF.** In ejectment, peaceable possession by the defendant, acquired without ousting plaintiff, is sufficient evidence of title to place the burden of proof on the plaintiff to show a better title. *Hope v. Brown*..... 421

ELECTION:

To retake property under conditional sales contract, see **SALES**, 3, 4.

ELECTIONS:

Submission of bond issue to vote, see COUNTIES.

Selection of physician by employees of mine, see MASTER AND SERV-
ANT, 2.

Submission of ordinance to vote of people, see MUNICIPAL CORPORA-
TIONS, 1-3.

Submission of state indebtedness to voters, see STATES, 1.

1. **ELECTIONS—CONTEST—NATURE AND FORM.** A proceeding to set aside a certificate of election issued by the canvassing board declaring the defendant elected to a prospective official term, is an election contest and controlled entirely by statute, Rem. & Bal. Code, §§ 4941-4957. *Quigley v. Phelps*..... 73
2. **SAME—COMPLAINT—GROUNDS.** A complaint in an election contest alleging that the officers in each of the precincts wrongfully, intentionally and fraudulently counted for the defendant ballots actually cast for the plaintiff, sufficient to change the result, sufficiently charges "malconduct" on the part of such officers, within the meaning of Rem. & Bal. Code, § 4941, specifying the grounds for contest. *Quigley v. Phelps*..... 73
3. **SAME—CONTEST—RECOUNT—PLEADINGS — BONA FIDES.** A general charge of malconduct in that the election officers in each of 391 precincts of a county fraudulently counted ballots for the defendant which were actually cast for the plaintiff is so lacking in the essential element of good faith as to warrant the court in refusing to order a recount of the ballots until preliminary evidence to impeach the returns be adduced. *Quigley v. Phelps*..... 73
4. **SAME—RECOUNT—BALLOTS—PRELIMINARY EVIDENCE TO IMPEACH.** While the ballots may be conceded to be the best evidence of the result of an election, in the absence of a statute requiring a recount on a contest, it is not an abuse of discretion to refuse to order a recount of the ballots in a populous county, unless preliminary evidence is first adduced to impeach the returns, where the charges of malconduct were general and vague, and the work of recounting would require much time and expense. *Quigley v. Phelps*..... 73

EMINENT DOMAIN:

Public improvements by municipalities, see MUNICIPAL CORPORATIONS,
17, 19, 20, 27, 28.

1. **EMINENT DOMAIN—TAKING FOR PUBLIC USE—INJURY TO ABUTTERS.** Where a city extends the slope of the fill in street grading work onto abutting property there is a taking of the property for public use, within Const., art. 1, § 16, providing that no property shall be taken for public use without compensation. *Kincaid v. Seattle*..... 617
2. **EMINENT DOMAIN—COMPENSATION—INJURY TO PROPERTY—MEASURE OF DAMAGES.** The measure of damages for extending the slope of a

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fill in street grading work onto abutting property is the difference between the fair market value of the property before and after the taking; and not the cost of removing the earth and building a bulk-head. *Kincaid v. Seattle*..... 617

3. EMINENT DOMAIN—AWARD—WRONGFUL DISTRIBUTION — LIABILITY.

Where a city, after bringing in all the necessary parties and prosecuting condemnation proceedings strictly as required by law, paid the award to the parties adjudged entitled thereto, no appeal having been taken from the judgment, it is not liable to the true owners of the property even though payment was made to the wrong parties through inadvertence, fraud, or the failure of the parties to keep faith with one another. *Carton v. Seattle*..... 375

4. EMINENT DOMAIN—COMPENSATION — PERSONS ENTITLED — CONVEY-

ANCE PENDING PROCEEDINGS. A warranty deed without reservation of lands damaged by a pending condemnation, after the verdict for damages but prior to entry of judgment or payment of the award or the damaging of the property, entitles the grantee to the compensation awarded, in view of the fact that under Const., art. 1, § 16, and Rem. & Bal. Code, §§ 7783, 7784, and 7816, the condemnation is not completed or the award an enforceable demand until the entry of the last judgment and expiration of the statutory period for abandonment of the proceedings or waiver thereof. *In re Twelfth Avenue South* 132

5. EMINENT DOMAIN — COMPENSATION — PERSONS ENTITLED—LOSS OF

TITLE PENDING PROCEEDINGS. The purchaser at execution sale of lands damaged by a pending condemnation, after verdict but prior to entry of judgment, is entitled to the compensation in view of the fact that the condemnation is not completed or the award an enforceable demand until the entry of the last judgment and the expiration of the statutory period for abandonment of the proceedings or waiver thereof; since the purchaser at judicial sale is regarded as the owner from the day of sale, where he afterwards received his sheriff's deed. *Damon v. Ryan*..... 138

6. EMINENT DOMAIN—DAMAGES —AWARD — JUDGMENT — CONCLUSIVE-

NESS—RES JUDICATA. A condemnation award for damages to an abutting lot from a fill raising the grade of a street is not *res judicata* or a bar to a subsequent action to recover damages when the fill in the street slid down upon the lot on account of defects in the engineering plans and the failure of the city to condemn sufficient land to sustain the fill, where the subsequent damage was not foreseen by the engineers planning the improvement, and rested in speculation or conjecture until it occurred. *Hinckley v. Seattle*.. 101

EMPLOYEES:

See MASTER AND SERVANT.

ENTRY:

Of judgment, see JUSTICES OF THE PEACE, 1.

EQUITY:

See SPECIFIC PERFORMANCE.

Review in equitable actions, see APPEAL AND ERROR, 4.

Relief from mistake of law, see LANDLORD AND TENANT, 5.

ESTABLISHMENT:

Of boundary, see BOUNDARIES.

Of highways, see HIGHWAYS, 1.

ESTATES:

Decedents' estates, see EXECUTORS AND ADMINISTRATORS.

ESTOPPEL:

To assert fraud in inducing subscription to stock, see CORPORATIONS, 1.

By judgment, see JUDGMENT, 5-7.

Of tenant to dispute title of landlord, see LANDLORD AND TENANT, 1.

Of tenant to assert right to remove building, see LANDLORD AND TENANT, 5.

Of city to recover overpayment to contractor, see MUNICIPAL CORPORATIONS, 15.

To claim preference right to purchase tide lands, see PUBLIC LANDS, 6.

EVIDENCE:

See ALTERATION OF INSTRUMENTS, 3.

Exceptions to obtain review in equity case, see APPEAL AND ERROR, 4.

Incorporation in record on appeal, see APPEAL AND ERROR, 9, 12.

Establishment of boundary, see BOUNDARIES.

Of agreement to pay broker's commission, see BROKERS, 3, 4.

To show extent of settlement agreement between debtor and trustee for creditors, see CONTRACTS, 4.

To prove damages on breach of contract, see CONTRACTS, 11.

To show representative capacity of makers of note, see CORPORATIONS, 8.

To show insolvency of corporation, see CORPORATIONS, 10.

In criminal prosecutions, see CRIMINAL LAW, 1, 2, 6.

To show parol dedication, see DEDICATION.

To authorize divorce, see DIVORCE, 1.

To warrant modification of divorce decree, see DIVORCE, 7.

Of title, see EJECTMENT.

Election contest, see ELECTIONS, 4.

Of credits due executor on final settlement of estate, see EXECUTORS AND ADMINISTRATORS, 3-5.

Establishment of highway by prescription, see HIGHWAYS, 1.

EVIDENCE—CONTINUED.

- In prosecution for murder, see **HOMICIDE**, 1, 2.
- Persons concluded by judgment, admissibility of, see **JUDGMENT**, 5.
- Of fraud to relieve from estoppel to deny landlord's title, see **LANDLORD AND TENANT**, 1.
- For injuries to servant in general, see **MASTER AND SERVANT**, 4-7, 16, 17, 19.
- To show money lent, see **MONEY LENT**.
- Recovery of money paid, see **MONEY PAID**.
- To show absolute deed as mortgage, see **MORTGAGES**, 1.
- For personal injuries in city street, see **MUNICIPAL CORPORATIONS**, 24.
- Accepting earnings of prostitute, see **PROSTITUTION**, 3.
- Release of claim for damages, see **RELEASE**.
- Breach of warranty, see **SALES**, 1.
- Election to retake property under conditional sales contract, see **SALES**, 3, 4.
- Notice of foreclosure suit, see **TAXATION**, 2.
- Reception at trial, objections, see **TRIAL**, 1.
- Questions of fact for jury, see **TRIAL**, 4, 5.
- Testimony of witnesses, see **WITNESSES**.
1. **EVIDENCE—JUDICIAL NOTICE:** The courts can judicially notice that it might be impossible to hold a referendum election within thirty days after the passage of an ordinance. *Stetson v. Seattle*. 606
 2. **EVIDENCE—RELEVANCY—REMOTENESS.** In an action for personal injuries sustained in street grade work, evidence as to the grade of the slope at the time of the trial is admissible where by comparison it enabled the jury to determine the grade at the time of the accident. *Christiansen v. McLellan*..... 318
 3. **EVIDENCE—PAROL EVIDENCE TO VARY WRITING.** Where a memorandum of a sale of corporate stock recited the consideration for only one-half of the stock, sold by one party, and was clearly intended to cover only part of the transaction touching the sale by such half owner, and was incomplete on its face, oral evidence as to the consideration for the balance of the stock purchased from another party is not inadmissible as tending to vary the terms of the writing. *Seattle Taxicab & Transfer Co. v. Kinney*..... 179
 4. **EVIDENCE—OPINION EVIDENCE—EXPERTS.** The opinions of experts are admissible as to whether it would be safe to drive a team and wagon loaded with earth down a steep embankment in street grading work, if the place was such as to require a person of special experience and knowledge to determine it. *Christiansen v. McLellan* 318

EXAMINATION:

- Of witnesses in general, see **WITNESSES**.
- Of expert witnesses, see **EVIDENCE**, 4.

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5. **SAME.** On final settlement, an executor is entitled to credit for an overdraft at a bank where he kept funds of the estate, where the sum was expended on behalf of the estate. *In re Witt's Estate.* 172
6. **SAME—ATTORNEY'S CHARGES.** An attorney's fee of \$2,250, allowed for services in the settlement of an estate appraised at \$37,761, is not unreasonable, when the estate was kept open a long time in an effort to pay off an indebtedness of \$17,000 without disposing of the real estate. *In re Witt's Estate*..... 172

EXPERT TESTIMONY:

In civil actions, see **EVIDENCE**, 4.

EXTENSION:

Time for filing statement of facts, see **APPEAL AND ERROR**, 10, 11.

Review of order denying extension of time to file statement of facts, see **CERTIORARI**.

EXTRAS:

Liability for under building contract, see **CONTRACTS**, 7.

FEES:

Attorney's fees in divorce suit, see **DIVORCE**, 3.

Of attorney in settlement of estate, see **EXECUTORS AND ADMINISTRATORS**, 6.

Of attorney in foreclosure of lien, see **INDEMNITY**, 3.

FELLOW SERVANTS:

See **MASTER AND SERVANT**, 8, 9.

FILING:

Statement of facts, see **APPEAL AND ERROR**, 10, 11.

Claims against city for damages, see **MUNICIPAL CORPORATIONS**, 27-31.

FINAL JUDGMENT:

Appealability, see **APPEAL AND ERROR**, 1, 6.

FINAL ORDERS:

Grant of application to purchase tide lands, see **PUBLIC LANDS**, 4.

FINDINGS:

Review on appeal, see **APPEAL AND ERROR**, 16-23; **DIVORCE**, 2.

FIRE DEPARTMENT:

Hours of labor for employees, see **MUNICIPAL CORPORATIONS**, 4, 5.

FLIGHT:

Instructions as to flight of accused, see **CRIMINAL LAW**, 7.

FORECLOSURE:

- Of lien for installments due on note, before maturity of debt, see ACTION.
- Of lien, see MECHANICS' LIENS.
- Of mortgages, see MORTGAGES, 2.
- Of assessment lien, see MUNICIPAL CORPORATIONS, 19.
- Of tax lien, see TAXATION.

FORFEITURE:

- Waiver of right to forfeit contract, see CONTRACTS, 10.
- Of land contract, see VENDOR AND PURCHASER, 1, 8, 9, 11.

FORMER ADJUDICATION:

- See JUDGMENT, 5-7.

FRAUD:

- See FRAUDULENT CONVEYANCES.
- Inducing subscription to corporate stock, see CORPORATIONS, 1-5.
- To relieve from estoppel to deny landlord's title, see LANDLORD AND TENANT, 1.
- In procuring release, see RELEASE.
- Inducing sale, see SALES, 1.
- In obtaining tax title, see TAXATION, 1, 5, 6.
- Sales of realty, see VENDOR AND PURCHASER, 5-7.

1. FRAUD—DAMAGES—MISREPRESENTATIONS—KNOWLEDGE OF FALSITY—MATTERS OF FACT. False representations that land at a distance was level and capable of irrigation and good fruit land, inducing a sale, are actionable although made without knowledge of their falsity or intent to deceive, where the vendor knew that the vendee was in ignorance of the facts and relied upon the representations; since they were matters of fact and not of opinion, susceptible of his own knowledge. *Grant v. Huschke*..... 257

FRAUDS, STATUTE OF:

- Contract with broker for commission, see BROKERS, 2.

1. FRAUDS, STATUTE OF—REAL ESTATE—BROKERS—COMMISSIONS. Standing timber is "real estate," within the statute of frauds, Rem. & Bal. Code, § 5289, requiring contracts for a broker's commission for the sale of real estate to be in writing. *Engleson v. Port Crescent Shingle Co*..... 424
2. SAME—CONTRACT FOR COMMISSIONS. A contract to procure persons who would buy standing timber, for which the party was to be paid for his trouble is, in its essence, a contract employing a broker to sell standing timber on commission, and within the statute of frauds. *Engleson v. Port Crescent Shingle Co*..... 424

FRAUDS, STATUTE OF—CONTINUED.

3. **SAME—WRITING—SUFFICIENCY.** Under the statute of frauds requiring an agreement to pay a broker's commissions to be in writing, the writing is insufficient where it neither describes the property to be sold nor specifies the amount of the commissions to be paid. *Engleson v. Port Crescent Shingle Co.*..... 424
4. **FRAUDS, STATUTE OF—ORAL SALE OF LAND—PART PERFORMANCE—POSSESSION AND IMPROVEMENTS.** There is sufficient part performance of an oral contract for the sale of land to take the same out of the operation of the statute of frauds, where the purchaser took and retained possession with the consent of the vendor, and made permanent improvements consisting of a board house, shed, clearing and grading, enhancing the value of the property. *Bendon v. Parfit* 645
5. **FRAUDS, STATUTE OF—ORAL CONTRACT OF EMPLOYMENT—WAIVER—FAILURE TO PLEAD OR OBJECT TO EVIDENCE.** The objection that an oral contract for employment for five years is void under the statute of frauds is waived by failing to raise it in the lower court either by pleading it as a defense or by objecting to the admission of parol evidence, or by assignment of error thereon in the supreme court. *Seattle Taxicab & Transfer Co. v. Kinney*..... 179

FRAUDULENT CONVEYANCES:

1. **FRAUDULENT CONVEYANCES—SALES-IN-BULK—CREDITORS—CONDITIONAL VENDORS—NOTICE.** The vendor in a conditional sales contract, who has not elected to retake the property and cancel the debt, is protected as a creditor under the sales-in-bulk act where his vendee makes a sale of goods in bulk without complying with the act, and it is not necessary that he give notice to the fraudulent vendee that he intends to rely upon the statute. *Stewart & Holmes Drug Co. v. Reed* 401
2. **FRAUDULENT CONVEYANCES—DEED FROM HUSBAND TO WIFE—RIGHTS OF CREDITORS—SUBSEQUENT PURCHASER.** A conveyance by husband to wife of community property without a valuable consideration, after contracting a community debt, is constructively fraudulent as to the community creditor. *Ruuth v. Morse Hardware Co.*..... 361

FUNDS:

Liability of general fund to pay for land purchased by city for cemetery, see **MUNICIPAL CORPORATIONS**, 25.
 Investment of school funds in capitol building bonds, see **SCHOOLS AND SCHOOL DISTRICTS**, 1.
 Capitol building fund, see **STATES**.

FUNERAL EXPENSES:

Liability of wife for, see **HUSBAND AND WIFE**, 1, 2.

GAMING:

Designation of offense, see **INDICTMENT AND INFORMATION**, 1.

1. **GAMING—ELEMENTS OF OFFENSE — STATUTES — CONSTRUCTION.** In an information for conducting a poker game as owner, under Rem. & Bal. Code, § 2469, defining a common gambler as every person who conducts as owner . . . any gambling game or game of chance played with cards . . . "or any scheme or device whereby any money is bet, wagered or hazarded upon any chance or any uncertain or contingent event," it is not necessary to expressly charge that money was bet; since (a) the quoted words do not apply to that part of the statute; and (b) were it otherwise, the charge of playing poker for money alleges a game of chance, and a hazarding upon an uncertain or contingent event. *State v. Robey*..... 562

GOOD FAITH:

Of purchaser, see **BILLS AND NOTES**, 3.

In abolishing office, see **MUNICIPAL CORPORATIONS**, 9.

GRANTS:

Of public lands, see **PUBLIC LANDS**, 1, 2.

GUARANTY:

See **INDEMNITY; PRINCIPAL AND SURETY**.

Agreement to guarantee dividends on stock, see **CORPORATIONS**, 6, 7.

1. **GUARANTY—TELEGRAM—CONSTRUCTION.** Where a corporation, upon demand for payment or security of its note given to a bank for a loan, sought a renewal agreeing that its president should guarantee the note, and the president, knowing that the bank was not satisfied, telegraphed "Tell bank I request them to renew note . . . I will arrange things satisfactory to them upon my return," which caused the bank to forbear, the telegram was understood as, and was, a guaranty of the note; since no particular form of words is necessary and the writing must be so construed as to determine the intention of the parties. *Exchange National Bank v. Pantages*..... 481

GUARDIAN AND WARD:

Review of rulings in guardianship proceedings as dependent on presentation of same by record, see **APPEAL AND ERROR**, 9.

Guardian *ad litem*, see **INFANTS**.

Service of process on guardian, see **INSANE PERSONS**.

Power of court over guardian *ad litem*, see **REMOVAL OF CAUSES**.

1. **GUARDIAN AND WARD—SETTLEMENT.** Under Rem. & Bal. Code, § 1636, a guardian must fully account for and pay over all the ward's estate at the expiration of the trust. *In re Sroufe's Estates* 639
2. **GUARDIAN AND WARD—SETTLEMENT AND DISCHARGE—VACATION—LIMITATIONS.** Rem. & Bal. Code, § 464, limiting the time for the

GUARDIAN AND WARD—CONTINUED.

vacation of an order discharging a guardian for minors to one year after the minors arrive at full age, has no application, where an order discharging a guardian and settling his final account was entered without notice to, or knowledge of, his ward, there was no actual settlement, and he continued to hold himself out as guardian; since the order is *ex parte* and void for want of jurisdiction, and may be vacated at any time. *In re Sroufe's Estates*..... 639

HARMLESS ERROR:

In civil actions, see **APPEAL AND ERROR**, 24.

In criminal prosecution, see **CRIMINAL LAW**, 9.

HIGHWAYS:

Dedication to public use, see **DEDICATION**.

1. **HIGHWAYS — PRESCRIPTION—EVIDENCE—SUFFICIENCY.** A highway by prescription is not established by use of a wagon road, convenience way, or trail, confined to a few people, and used by sufferance of the owners. *Maggs v. Seattle*..... 323
2. **HIGHWAYS—CONSTRUCTION—CONTRACTS—UMPIRE—INTEREST.** The fact that the state highway commissioner as such official was one of the parties to a contract for state road construction, does not preclude the parties from agreeing that he shall act as umpire in the matter of any dispute as to the meaning of any provision of the contract. *State ex rel. Noble v. Bowlby*..... 54
3. **HIGHWAYS—USE — NEGLIGENT DRIVING — OWNERSHIP OF VEHICLE—QUESTION FOR JURY.** In an action for damages caused by an automobile, ownership of the automobile establishes *prima facie* that it was driven for and in the possession of the owner, making a question for the jury, although the driver testified that he was operating it upon an independent percentage basis. *Purdy v. Sherman*..... 309
4. **SAME—DAMAGES—SPECULATIVE DAMAGES.** In an action for injuries sustained by a physician in an automobile collision, plaintiff's loss of a prospective surgical operation which he was hindered from performing is too remote and speculative to form the basis of a recovery. *Purdy v. Sherman*..... 309

HOMESTEAD:

As separate property of husband, see **HUSBAND AND WIFE**, 3.

HOMICIDE:

1. **HOMICIDE—DEFENSES—INSANITY—BURDEN OF PROOF.** In a prosecution for murder, it is proper to instruct that the burden of proving insanity as a defense is upon the defendant to establish by the preponderance of the evidence, failing which the presumption of sanity must prevail and the defendant found guilty. *State v. Harris*.... 60

HOMICIDE—CONTINUED.

2. **HOMICIDE—SELF-DEFENSE—EVIDENCE—ADMISSIBILITY — CORROBORATION.** Where defendant, a street car conductor, claimed self-defense in a killing by shooting in the nighttime at an isolated location at the end of the car line, and had testified that the father of the deceased started to get off the car at a certain place, calling to his son, but after consultation between them and threats to "get him" at the end of the line, they rode past their destination and attacked him instead of leaving the car when the end of the line was called, the defendant should be allowed to show that passengers for their destination usually left the car where the father started to get off, as it tended to corroborate him and show their motive in remaining on the car; also, the reputation of the line for lawlessness, his knowledge thereof, and the isolation of the place, as tending to show whether he acted as a reasonably prudent man in defending himself. *State v. Tribett* 125
3. **HOMICIDE—DEFENSES—DEFENSE OF SON—INSTRUCTIONS.** In a trial for the killing of a father and son, in which the defense claimed that the son was the aggressor, an instruction that the father had a right to come to the defense of his son if, seeing him assaulted, he believed him in danger of great personal injury, should have been qualified by an instruction that, if the son was himself the aggressor, the right to come to his defense remained in abeyance until the son had in good faith attempted to withdraw from the conflict which he had brought on; and failure to make the qualification, where there is no other instruction upon the right of the father to come to the defense of the son, is not cured by other correct instructions on the question of self-defense. *State v. Tribett*..... 125

HOURS:

For service of city employees, see **MUNICIPAL CORPORATIONS**, 4, 5.

HUSBAND AND WIFE:

See **DIVORCE**.

Conveyances between, see **FRAUDULENT CONVEYANCES**, 2.

Judgment lien as to after acquired property, see **JUDGMENT**, 8.

1. **HUSBAND AND WIFE—LIABILITY OF WIFE FOR FUNERAL EXPENSES.** Under Rem. & Bal. Code, § 1568, making the funeral expenses a preferred claim against the estate, the wife's liability for her husband's funeral expenses is secondary and not primary, and in the absence of an express promise cannot be enforced until the creditor has exhausted his remedy against the estate. *Butterworth v. Bredemeyer* 524
2. **SAME—IMPLIED PROMISE.** A mere direction to furnish services for a husband's funeral is presumed to be made on the faith of the credit of the estate, and does not imply a promise to pay for the same. *Butterworth v. Bredemeyer*..... 524

HUSBAND AND WIFE—CONTINUED.

3. **HUSBAND AND WIFE—COMMUNITY PROPERTY—PUBLIC LANDS—HOMESTEAD ENTRY—TITLE.** Where a single man made homestead entry upon public lands, and subsequently married and thereafter patent issued to him, the land became his separate property. *Teynor v. Heible* 222
4. **HUSBAND AND WIFE—CONVEYANCES BETWEEN—SEPARATE PROPERTY.** Where a wife conveyed to her husband a half interest in certain lots, theretofore her separate property, either as a gift or upon consideration of certain payments to be made from the husband's separate estate, the interest conveyed becomes the separate property of the husband, regardless of the form of the deed, and they thereafter hold the property as tenants in common and not as community property. *Powers v. Munson* 234
5. **SAME—CONVEYANCES BETWEEN—FORM OF DEED—COMMUNITY PROPERTY.** Rem. & Bal. Code, § 8766 with reference to the form of a conveyance between husband and wife of community property has no application to conveyances of an interest in separate property. *Powers v. Munson* 234
6. **SAME—HUSBAND'S SEPARATE PROPERTY—CONVEYANCE.** Under Rem. & Bal. Code, § 5915, the husband may convey his separate property without his wife's joining in the deed. *Powers v. Munson*..... 234
7. **HUSBAND AND WIFE—COMMUNITY DEBTS—INDEMNITY—NATURE OF WIFE'S OBLIGATION.** Where a mortgage was given by a husband and wife upon community property as security for the performance of a building contract entered into by the husband and his copartner, the debt was *prima facie* a community debt, and the obligation assumed by the wife is direct and not collateral. *Bird v. Steele*..... 68

IMPEACHMENT:

- Of verdict, see TRIAL, 6.
 Of witness, see WITNESSES, 2-4.

IMPLIED CONTRACTS:

- Payment of insurance premium, see INSURANCE, 1.

IMPLIED PROMISE:

- To pay funeral expenses of husband, see HUSBAND AND WIFE, 2.

IMPROVEMENTS:

- Submission of bond issue for to vote, see COUNTIES.
 Public improvements, see MUNICIPAL CORPORATIONS, 10-14, 16-20.

INDEMNITY:

- Mortgage on community property to insure performance of contract, as community debt, see HUSBAND AND WIFE, 7.

INDEMNITY—CONTINUED.

Indemnity insurance, see **INSURANCE**, 2.

Conclusiveness of judgment against sureties with notice, see **JUDGMENT**, 5.

Against mechanics' lien, see **MECHANICS' LIENS**, 1.

Foreclosure of indemnity mortgage, see **MORTGAGES**, 2.

1. **INDEMNITY—PAYMENT OF FOREIGN JUDGMENT—PRESUMPTIONS.** In an action on a contract to indemnify the surety in a replevin bond, the fact that the surety diligently defended an action in a foreign court having jurisdiction, brought on the replevin bond for damages resulting from the detention of the property, and was compelled to satisfy the judgment therein, establishes *prima facie* that the surety suffered damages by reason of becoming a surety on the bond; and it is not essential that such damages be recovered in the replevin action. *United States Fidelity & Guaranty Co. v. Howell*..... 596
2. **SAME—CONTRACT—CONSTRUCTION.** An agreement to reimburse a surety in a replevin bond for any damages suffered by it in becoming a surety, contemplates damages recovered against the surety in an action on the bond for detention of the property. *United States Fidelity & Guaranty Co. v. Howell*..... 596
3. **INDEMNITY—BUILDING CONTRACTS—LIENS—ATTORNEY'S FEES—DAMAGES—MITIGATION.** The owners of a building, seeking recovery from the contractors' surety for their default in performance, are not obliged to settle with lien claimants before judgment foreclosing the liens, in order to mitigate damages by saving attorney's fees in the foreclosures, where they used due diligence to ascertain the just amount of the claims without obtaining such information as would justify their payment before judgment. *Wiley v. Hart*..... 142

INDICTMENT AND INFORMATION:

See **GAMING; PROSTITUTION**.

1. **INDICTMENT AND INFORMATION—DESIGNATION OF OFFENSE—GAMING.** An information for "conducting a gambling game as owner," under a statute designating the party committing the crime as "a common gambler," is not demurrable as having improperly designated the crime, where it was otherwise sufficient. *State v. Robey*..... 562
2. **INDICTMENT AND INFORMATION—REQUISITES—DUPLICITY—LARCENY.** An information charging larceny by color and aid of false pretenses and also as bailee or trustee, charges the commission of the offense in two ways specified by Rem. & Bal. Code, § 2601, and since they are not repugnant and proof of one means is not inconsistent with proof of the other, the information does not charge more than one crime and is direct and certain within the requirements of Rem. & Bal. Code, §§ 2057, 2059. *State v. Pettit*..... 510
3. **SAME—REQUISITES — ALTERNATIVE MEANS — JOINER OF OFFENSES.** Where a statute defining a crime specified different ways in which

INDICTMENT AND INFORMATION—CONTINUED.

it may be committed, connecting the same with the disjunctive "or," an information may charge alternative means connecting the same with the conjunction "and." *State v. Pettit*..... 510

4. **INDICTMENT AND INFORMATION—DUPLICITY.** An information charging two persons with accepting the earnings of a common prostitute is not duplicitous when it charges both with a single crime. *State v. Columbus* 290

INDORSEMENT:

Of fictitious payment as alteration of note, see **ALTERATION OF INSTRUMENTS**, 1, 2.

Of bill of exchange or promissory note, see **BILLS AND NOTES**, 2.

Of notes as collateral, effect on right to rescind contract, see **VENDOR AND PURCHASER**, 2.

INFANTS:

See **GUARDIAN AND WARD**.

Custody and support on divorce of parents, see **DIVORCE**, 7-9.

1. **INFANTS — GUARDIAN AD LITEM — APPOINTMENT — CONTROL.** The court appointing a guardian *ad litem* to prosecute a suit for a minor has plenary power to revoke the appointment and name a substitute, without any appellate or supervisory jurisdiction in the supreme court over the same. *State ex rel. Barnard v. Superior Court* 559

INFORMATION:

Criminal accusation, see **INDICTMENT AND INFORMATION**.

INITIATIVE AND REFERENDUM:

Submission and adoption of city ordinance, see **MUNICIPAL CORPORATIONS**, 1-3.

INJUNCTION:

See **NUISANCE**.

Injunction bonds, see **BONDS**.

Enjoining enforcement of judgment, see **JUSTICES OF THE PEACE**, 2.

Enjoining trespass, see **TRESPASS**, 1.

INSANE PERSONS:

Insanity as defense to crime, see **HOMICIDE**, 1.

1. **INSANE PERSONS—ACTIONS—SERVICE OF PROCESS—GUARDIANS—JURISDICTION.** Under Rem. & Bal. Code, § 1670, providing that in actions against an incompetent person, process shall be served upon his guardian, and any judgment against the ward or guardian shall be satisfied from the property of the ward only, service of summons on the guardian as such confers jurisdiction to enter judgment against

INSANE PERSONS—CONTINUED.

the estate of the ward. *United States Fidelity & Guaranty Co. v. Howell* 596

2. **SAME—ACTIONS—PLEADINGS—TITLE.** Under said section, an action against an incompetent may be brought in form, and entitled in the caption, against the guardian as such. *United States Fidelity & Guaranty Co. v. Howell* 596

INSANITY:

As defense, right to open and close, see **CRIMINAL LAW**, 3.

INSOLVENCY:

Of corporation, see **CORPORATIONS**, 10.

INSPECTION:

Duty to inspect appliances, see **MASTER AND SERVANT**, 4.

INSTALLMENT:

Premature action to recover installment due on note, see **ACTIONS**.

INSTRUCTIONS:

Exceptions to for purpose of review, see **APPEAL AND ERROR**, 3.
In criminal prosecutions, see **CRIMINAL LAW**, 5-7, 10; **HOMICIDE**, 1, 3.
In civil actions, see **TRIAL**, 6, 7.

INSURANCE:

1. **INSURANCE—REBATING — CONTRACTS—VALIDITY—STATUTES —VIOLATION—EFFECT ON CONTRACT.** A contract for insurance at a reduced rate, in violation of § 33 of the insurance code (Laws 1911, p. 195), prescribing penalties for so doing, is not void, in the absence of any provision in the statute so declaring; hence there is no implied contract on the part of the insured to pay the balance of the lawful premium. *Way v. Pacific Lumber and Timber Co.*..... 332
2. **INSURANCE — INDEMNITY INSURANCE—POLICY—LIABILITY — LOSSES COVERED.** A policy of indemnity insurance indemnifying contractors on city sewers against loss from liability "imposed by law" upon the assured on account of bodily injuries accidentally suffered by any person while about the construction of the sewers, covers a loss suffered by the assured by reason of being liable over to the city for damages it was compelled to pay to a pedestrian who fell into the sewer because of its unguarded condition; since the liability of the city did not lessen the liability of the assured, who committed the original wrong; and it is immaterial that the assured was not a nominal party to the action against the city. *Kibler v. Maryland Casualty Co.* 159

INTENT:

Absolute deed as mortgage, see **MORTGAGES**, 1.

INTEREST:

See **USURY**.

Official interest as affecting decision of umpire, see **ARBITRATION AND AWARD**.

Official interest of umpire as affecting appointment, see **HIGHWAYS**, 2.

Right of contractor to accrued interest on bonds, see **MUNICIPAL CORPORATIONS**, 14, 15.

1. **INTEREST—DAMAGES—UNLIQUIDATED DAMAGES.** Interest is properly allowed from the time of the commencement of an action for damages to property by breach of a regrading contract, although unliquidated. *Sweeney v. Lewis Construction Co.*..... 303

INTOXICATING LIQUORS:

1. **INTOXICATING LIQUORS — LICENSES—REGULATION—SALOON “FRONTING” ON STREET.** A saloon, the main entrance of which is directly opposite the entrance of a hotel lobby opening upon a street, and thus directly upon the street through the unobstructed hotel lobby, “fronts” upon such street, although it is eighty feet distant from the street, within the meaning and spirit of an ordinance prohibiting the granting of more than two saloon licenses in the same block “fronting on the same street.” *Zbinden v. Seattle*..... 1
2. **INTOXICATING LIQUORS—LICENSE FEES—REFUND—MUNICIPAL CORPORATIONS—POWERS—MORAL OBLIGATION.** A city council, upon cancelling a liquor license for no fault of the licensees, may refund the unearned portion of the license money, without express statutory authority, since it was a moral obligation which they could pay or compromise. *State ex rel. Maddaugh v. Ritter*..... 649

JOINDER:

Of offenses in information, see **INDICTMENT AND INFORMATION**, 3.

Of parties in civil actions, see **PARTIES**.

JUDGES:

See **JUSTICES OF THE PEACE**.

Compelling judge to certify proper statement of facts, see **APPEAL AND ERROR**, 12.

Misconduct of as harmless error, see **CRIMINAL LAW**, 9.

Mandamus to judge, see **MANDAMUS**, 1, 3.

JUDGMENT:

See **TRESPASS**.

Review, see **APPEAL AND ERROR**.

Designating part of judgment appealed from, see **APPEAL AND ERROR**, 7.

For services of broker, see **BROKERS**, 5.

Condemnation proceedings, see **EMINENT DOMAIN**, 3-6.

JUDGMENT—CONTINUED.

Decree of distribution of estate of decedent, see EXECUTORS AND ADMINISTRATORS, 2.

Payment of by surety in replevin bond as evidence of damages sustained, see INDEMNITY, 1.

Entry of, see JUSTICES OF THE PEACE.

Vacation of tax judgment, see TAXATION, 1.

1. JUDGMENT—DEFAULT—NOTICE—APPEARANCE. Appearance in a case prior to entry of default entitles the defendant to notice of all subsequent proceedings, and it is therefore technical error to grant the default without notice. *Richman v. Wenaha Co.*..... 370
2. JUDGMENT—VACATION—DISCRETION. Technical error in granting a default judgment does not establish abuse of discretion in refusing to open the default, unless the error was prejudicial. *Richman v. Wenaha Co.* 370
3. JUDGMENT—VACATION—ABUSE OF DISCRETION. It is an abuse of discretion to refuse to open a default judgment entered after motion for change of venue showing that the court had no jurisdiction, although the application for change of venue was not made until after the motion for default. *Richman v. Wenaha Co.*..... 370
4. JUDGMENTS—CONCLUSIVENESS—COLLATERAL ATTACK—RECITALS. A recital in a judgment of final distribution that the court finds from "affidavits on file" that due service of notice was made, does not raise the presumption, on collateral attack of a valid personal service, where the only affidavits on file show a defective publication; since the only affidavits on file negative personal service and affirmatively show want of jurisdiction. *Teynor v. Heible*..... 222
5. JUDGMENT—PERSONS CONCLUDED—INDEMNITY—SURETIES HAVING NOTICE. A judgment against a city for personal injuries sustained by one who fell into an unguarded sewer excavation, is admissible in evidence against the contractors to establish their negligence, and also against their insurer indemnifying them against loss, where the contractors' negligence was the issue in the suit against the city, and the contractors and their insurer had notice of the suit and employed counsel to defend it. *Kibler v. Maryland Casualty Co.* 159
6. JUDGMENT—RES JUDICATA—MATTERS CONCLUDED. The dismissal of actions for conversion for insufficiency of proof is not conclusive of anything except that the defendant did not convert the property. *Allen v. Migliavacca Realty Co.*..... 347
7. JUDGMENTS—RES JUDICATA—MATTERS CONCLUDED. A judgment in favor of contractors in a mandamus proceeding determining merely that the contractors were entitled to be paid for additional yardage required in street grading work, is not *res judicata* in a subsequent action to determine the amount due to the contractors on final com-

JUDGMENT—CONTINUED.

pletion of the work, for which an assessment should be levied, nor a bar to an offset by the city for moneys in the hands of the contractors by reason of overpayments during the progress of the work, where that question was not litigated in the former action. *State ex rel. Grant Smith & Co. v. Seattle*..... 438

8. **JUDGMENTS—LIEN—COMMUNITY DEBT—HUSBAND AND WIFE.** Where one of the parties jointly interested in the purchase of land quit-claimed to his wife in fraud of creditors before acquiring title, title acquired jointly, after judgment against him, meets the lien of the judgment, and one of his partners thereafter taking a warranty deed from him and his wife is not an innocent purchaser, where he knew his relation to the property, and at his instance advanced his share of the purchase price for the final payment. *Ruuth v. Morse Hardware Co.* 361

JUDICIAL NOTICE:

In civil actions, see **EVIDENCE**, 1.

JUDICIAL SALES:

Pending condemnation, see **EMINENT DOMAIN**, 5.

JURISDICTION:

See **MANDAMUS**, 4.

Appellate jurisdiction, see **APPEAL AND ERROR**, 1.

Of action brought in wrong county, see **CORPORATIONS**, 9.

To appoint administrator, see **EXECUTORS AND ADMINISTRATORS**, 1.

To make final distribution of estate, see **EXECUTORS AND ADMINISTRATORS**, 2.

By service of process on guardian, see **INSANE PERSONS**.

Recitals as to due service of notice, see **JUDGMENT**, 4.

To order public improvement, see **MUNICIPAL CORPORATIONS**, 12.

Of courts, see **REMOVAL OF CAUSES**.

JURY:

Instructions in criminal prosecutions, see **CRIMINAL LAW**, 5-7, 10.

Verdict in civil actions, see **TRIAL**, 4, 5.

Questions for jury in civil actions, see **TRIAL**, 4, 5.

Instructions in civil actions, see **TRIAL**, 6, 7.

JUSTICES OF THE PEACE:

1. **JUSTICES OF THE PEACE—JUDGMENT—RENDITION—DELAY IN ENTRY—EFFECT.** Under Rem. & Bal. Code, § 1770, requiring a justice of the peace to keep a docket and enter judgment when rendered, and Id., § 1859, providing that in trials by the justice judgment shall be entered immediately after the close of the trial, and Id., § 404, defining a judgment to be the final determination of the action, a justice's announcement of judgment for the plaintiff at the close of the trial

JUSTICES OF THE PEACE—CONTINUED.

is the rendition of judgment, and the entry being a ministerial act, delay of ten days in making the entry is not so unreasonable as to render the judgment void. *Mundy v. Kern*..... 477

2. **SAME—JUDGMENT—REVIEW—APPEAL—INJUNCTION.** Where matters of defense in an action before a justice do not show want of jurisdiction over the subject-matter, the remedy of a party aggrieved by the judgment is by appeal or review, and not injunction against enforcement of the judgment. *Mundy v. Kern*..... 477

KNOWLEDGE:

Of falsity in making representations, see **FRAUD**.

LACHES:

In discovering fraud of corporation, see **CORPORATIONS**, 3.

As barring claim of preference right to purchase tide lands, see **PUBLIC LANDS**, 6.

As bar to performance of contract, see **SPECIFIC PERFORMANCE**, 3, 4.

LANDLORD AND TENANT:

Lease of wharf, see **WHARVES**.

1. **LANDLORD AND TENANT—ESTOPPEL TO DENY TITLE—EXCEPTIONS—FRAUD—EVIDENCE—SUFFICIENCY.** While a tenant is not estopped to dispute his landlord's title when induced to accept the landlord through fraud or misrepresentation, the misrepresentation must relate to a matter not equally within his knowledge and must constitute the inducement to the lease; hence representations that the tenant did not own a building which he knew that he did own, being mere expressions of a legal conclusion on facts known to both parties, do not constitute fraud, in the absence of any relation of confidence between the parties; nor does acceptance of a lease under a threat of eviction constitute duress or fraud so as to relieve from estoppel to dispute the landlord's title. *Allen v. Migliavacca Realty Co.* 347
2. **LANDLORD AND TENANT—LEASE—TERMINATION.** A tenancy from month to month is not terminated on the 28th of August, where the lease was made June 11th at which time it was not known when the tenancy would begin, the receipt for rent deposited recited that the rent was to commence about the 28th of the month, and the tenant moved in July 3d, and had fully paid for the second month. *Nordgren v. Lawrence* 305
3. **LANDLORD AND TENANT—DAMAGES—ACTIONS—REMEDIES BY TENANT.** An action for damages against a landlord who unlawfully entered the premises before the termination of the tenancy and made a general nuisance of himself need not be brought under the unlawful detainer statute. *Nordgren v. Lawrence*..... 305

LANDLORD AND TENANT—CONTINUED.

4. **LANDLORD AND TENANT—DAMAGES—EXCESSIVE VERDICT — MENTAL SUFFERING.** A verdict for \$1,000 damages is excessive, and should be reduced to \$500, where plaintiff, who was ill, was greatly disturbed and frightened when the defendant, her landlord, unlawfully forced an entrance into the house early in the morning, and made a general nuisance of himself until late in the afternoon, her fright was only temporary, and her illness not augmented. *Nordgren v. Lawrence* 305
5. **LANDLORD AND TENANT—BUILDINGS OF TENANT—REMOVAL—ESTOPPEL.** The tenant's right to remove a building under the conditions of a lease known to him, is waived, where he silently acquiesced in the claim of ownership by the landlord, accepted a new lease thereof, acknowledged such claim of ownership, and paid rent for the full term; and equity will not relieve from his mistake of law in supposing that he could collect the rent paid; since the principle of law was not doubtful and he was not free from blame. *Allen v. Migliavacca Realty Co.*..... 347
6. **LANDLORD AND TENANT—ACTIONS—PLEADING—VARIANCE—MATERIALITY.** In an action against a landlord, it is an immaterial variance, if any, that the complaint alleged that plaintiff was "seised and possessed and entitled to the possession" of premises, and the proof showed that she was a tenant from month to month, where the defendant knew the character of the possession. *Nordgren v. Lawrence* 305
7. **LANDLORD AND TENANT—RENTS—RECOVERY.** A judgment for the recovery of part of the rent paid, representing the rental value of a building belonging to the tenant, is not sustained, where the lease made no such segregation, and the amount was greatly in excess of the proportionate value of the building. *Allen v. Migliavacca Realty Co.* 347

LANDS:

See PUBLIC LANDS.

Power of regents to dispose of university lands, see COLLEGES AND UNIVERSITIES.

LARCENY:

See INDIOTMENT AND INFORMATION, 2.

LAW OF THE CASE:

See APPEAL AND ERROR, 25, 26.

LEASES:

See LANDLORD AND TENANT.

LEGISLATIVE POWER:

See MUNICIPAL CORPORATIONS, 1-3.

LIBEL AND SLANDER:

1. **LIBEL AND SLANDER—CRIMINAL PROSECUTION—NONRESIDENT PUBLISHERS—STATUTES—CONSTRUCTION.** Under Rem. & Bal. Code, § 2428, providing that in criminal libel, the editor or proprietor of a book or paper published in this state shall be proceeded against in the county where the book or paper was published, and Id., § 2429, providing that "every other person" publishing a libel in this state may be proceeded against in any county where such libelous matter was "published or circulated" the last section includes editors, proprietors and publishers of books and papers published without the state and circulated within the state. *State v. Piver*..... 96
2. **SAME—CRIMINAL PROSECUTION—VENUE—NONRESIDENTS.** The state has the power to define libel and punish offenders against the law within this state, although they are nonresidents and publish the libel outside of the state and circulate it in this state through the mails. *State v. Piver*..... 96
3. **SAME.** A nonresident publishing a libel as defined by our statutes and circulating it in this state, is punishable in this state, although punishment may be inflicted elsewhere for the commission of the offense in other jurisdictions. *State v. Piver*..... 96

LICENSES:

For sale of intoxicating liquors, see **INTOXICATING LIQUORS**.

1. **LICENSES — OCCUPATION—STATUTES—CONSTRUCTION.** Rem. & Bal. Code, § 7507, providing that a city of the first class may grant licenses for any lawful purpose and fix the amount to be paid, authorizes the licensing of vehicles for hire. *Seattle v. King*..... 277
2. **SAME—UNIFORMITY.** Const., art. 7, requiring taxes to be uniform, has no application to a city license tax upon occupations. *Seattle v. King*277
3. **SAME—LICENSE TAX—VALIDITY.** Rem. & Bal. Code, § 7507, providing that a city of the first class may grant licenses for any lawful purpose and fix the amount to be paid therefor, authorizes licenses for revenue as well as for regulation; hence a license fee of \$4 for vehicles for hire is not invalid because in excess of the sum needed for regulation. *Seattle v. King*..... 277

LIENS:

See **MECHANICS' LIENS**.

Settlement with lien claimants before judgment, to mitigate damages, see **INDEMNITY**, 3.

Judgment, see **JUDGMENT**, 8.

Mortgage, see **MORTGAGES**.

Tax lien, see **TAXATION**, 1.

LIMITATION:

State indebtedness, see STATES.

LIMITATION OF ACTIONS:

For vacation of order discharging guardian and settling final account, see GUARDIAN AND WARD, 2.

1. **LIMITATION OF ACTIONS—AS BAR TO DEFENSE—TAX TITLE.** Rem. & Bal Code, § 162, providing that an action to set aside a tax deed or recover land sold for taxes must be brought within three years from the date of the tax deed, cannot be invoked against a defendant in possession to preclude a defense that the tax deed was void, when sued in ejectment by the tax title holder after the expiration of the three years limited. *Buty v. Goldfinch*..... 532

LOANS:

See CONTRACTS, 6; MONEY LENT; USURY.

LOCATION:

Of boundary line, see BOUNDARIES.

LODGES:

Diversion of property and funds on secession of lodge, see BENEFICIAL ASSOCIATIONS.

MALCONDUCT:

Of election officers in counting ballots, see ELECTIONS.

MANDAMUS:

To compel judge to certify proper statement of facts, see APPEAL AND ERROR, 12.

Law of case as precluding grant of, see APPEAL AND ERROR, 26.

1. **MANDAMUS—WHEN LIES—REMEDY BY APPEAL.** The writ of mandamus cannot be used to perform the office of an appeal to review judicial action. *State ex rel. Langley v. Superior Court*..... 556
2. **MANDAMUS—TO CITY OFFICERS—MINISTERIAL DUTIES—SIGNING WARRANT.** Where the city council has, within its authority, allowed a claim, the mayor's duty to sign the warrant is ministerial, and mandamus lies to compel its performance. *State ex rel. Maddaugh v. Ritter* 649
3. **MANDAMUS—APPLICATION—TIME TO SUE.** An application for a writ of mandamus to secure the vacation of erroneous orders and the entry of a final judgment is not timely, and will be denied when not made until after the expiration of the time limited for taking an appeal from the orders. *State ex rel. Langley v. Superior Court* 556

MANDAMUS—CONTINUED.

4. **MANDAMUS — PROCEEDINGS — PLEADING—JURISDICTION.** A verified complaint with proper prayer for relief, is a sufficient compliance with Rem. & Bal. Code, § 1015, providing that the writ of mandamus must be issued upon "affidavit" on the application of the party beneficially interested, and confers jurisdiction to issue an alternative writ without issuance or service of a summons. *State ex rel. Adams v. Irwin* 589

MANDATE:

To lower court on decision on appeal, see **APPEAL AND ERROR**, 27, 28.

MARRIAGE:

See **HUSBAND AND WIFE**, 3.

MASTER AND SERVANT:

Order of employee for deduction of wage to pay for medical attention, as bill of exchange, see **BILLS AND NOTES**, 1.

Recovery for wrongful death, under Federal employers' liability act, see **DEATH**.

Relevancy of evidence in action for injury to servant, see **EVIDENCE**, 2.

Oral contract of employment, see **FRAUDS, STATUTE OF**, 5.

Liens for labor and materials, see **MECHANICS' LIENS**.

Employees of municipal corporations, see **MUNICIPAL CORPORATIONS**, 4-9.

1. **MASTER AND SERVANT—INJURY TO SERVANT—EXISTENCE OF RELATION.** The relation of master and servant existed between the plaintiff and defendant, where the owner of a team hired the plaintiff to drive the team and then let the team, wagon, and driver to defendant in street grading work, the plaintiff being under the direction and control of the defendant. *Christiansen v. McLellan*..... 318
2. **MASTER AND SERVANT—MEDICAL ATTENDANCE—PHYSICIANS AND SURGEONS—EMPLOYMENT.** A physician who obtained a number of orders from employees of a mining company, authorizing the company to deduct one dollar a month from their wages to pay a mine physician, who failed to recover on the orders because they were not accepted as required by law, cannot question the validity of an election, fairly conducted, by which a majority of all the employees chose another physician for the position and contracted with him for medical attendance upon all employees contributing thereto. *Sheets v. Coast Coal Co.*..... 327
3. **MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—UNSAFE METHOD OF WORK—QUESTION FOR JURY.** Whether a foreman in railway construction work adopted a safe method of loading a heavy timber, weighing 800 to 1,400 pounds, on a dump car, is a question for the jury, where attempt was made to lift it up one end at a time,

MASTER AND SERVANT—CONTINUED.

and it appears that four men were detailed to hold one end, seven feet above the ground on which they were standing, while other men attempted to swing around and lift up the other end, and that the timber was slippery from snow or ice upon it, and fell when the men were unable to lift the last end high enough to put it on the car. *Olson v. Carlson* 39

4. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—DEFECTIVE RAILWAY SWITCH—EVIDENCE—QUESTION FOR JURY. The negligence of a railroad company in failing to inspect a switch, in which two 85 pound track bolts had been placed between the switch point and stock rail in such a manner as to cause the derailment of a train and injury to a trainman, is for the jury, where the engineer of the last train over the switch noticed a rattling, stopped his train and made an inspection of part of the track, and finding nothing wrong notified the dispatcher to have the east switch of the east-bound track inspected by the next train, which was done without finding anything wrong, when an inspection of the east end of both the west and east-bound switches would have disclosed the fault. *Raske v. Northern Pac. R. Co.*..... 155
5. MASTER AND SERVANT—INJURY TO SERVANT—SAFE PLACE—WORKING PLACE IN COAL MINE—NEGLIGENCE—DEATH—CAUSE—EVIDENCE—SUFFICIENCY. There is sufficient evidence that the negligence of a coal mine owner caused the death of a miner, where it appears that his working place was not sufficiently supplied with air to dissipate carbon monoxide gas arising from the use of dynamite, that the presence of such gas was detected and a search made and the body of the deceased was found where it had fallen, upon his apparent hasty effort to escape from his working place, and characteristic symptoms on the body indicated to experts that he had met his death through poisoning from carbon monoxide gas. *Davies v. Rose-Marshall Coal Co.*..... 565
6. SAME—CAUSE OF INJURY—EVIDENCE—QUESTION FOR JURY. The negligence of an inexperienced engineer in starting a donkey engine "faster than usual" when signalled to pull on a log that was obstructed, is a question for the jury, where there was evidence that an experienced man would have started the engine slowly to avoid injury through swinging of the log, which occurred at the time in question. *Ostroski v. Blumauer Logging Co.*..... 672
7. SAME—DUTY TO WARN—NECESSITY—EVIDENCE—SUFFICIENCY. It cannot be said, as a matter of law, that a warning was given, or that it was unnecessary, where a man, without practical experience as a logger, working as a signalman in the woods near a cable for about two weeks, was injured while giving a signal and standing in the bight of the cable, there was evidence that he was not warned

MASTER AND SERVANT—CONTINUED.

of the danger, and was instructed by the foreman to give the signal at any point without crossing the road, and the foreman himself sometimes gave the signal from the same position. *Ostroski v. Blumauer Logging Co.*..... 672

8. MASTER AND SERVANT—INJURY TO SERVANT—INCOMPETENT FELLOW SERVANT—NEGLIGENCE OF MASTER—QUESTION FOR JURY. Negligence in employing an incompetent engineer to run a donkey engine in a logging camp is a question for the jury, where it appears that the fireman, a Japanese boy, was allowed to temporarily run the engine during the absence of the engineer, that he was inexperienced, excitable and reckless, and that complaint had been made of him as incompetent, two or three days before the accident. *Ostroski v. Blumauer Logging Co.*..... 672
9. SAME—FELLOW SERVANT'S NEGLIGENCE—QUESTION FOR JURY. In such a case, whether the negligence of fellow servants, assisting the plaintiff to hold one end of the timber on the car, in running away and letting the timber fall, was the cause of the injury, is a question for the jury, where there was evidence that they were unable to hold up the end. *Olson v. Carlson.*..... 39
10. SAME—ASSUMPTION OF RISK. In such a case, whether plaintiff assumed the risk or was guilty of contributory negligence, are questions for the jury, where he acted in pursuance of the specific directions of the foreman. *Olson v. Carlson.*..... 39
11. SAME—ASSUMPTION OF RISKS—OBEDIENCE TO ORDERS—PROMISE TO REPAIR—QUESTION FOR JURY. A servant proceeding along a narrow runway with a loaded wheelbarrow of concrete, in obedience to a direct order, does not assume the risk, where he protested against the use of the narrow runway and the foreman promised to fix it. *Lamoon v. Smith Cement Brick Co.*..... 164
12. SAME—ASSUMPTION OF RISKS—QUESTION FOR JURY. Whether the driver of a team assumed the risk in obeying the specific order of the master to drive down a steep embankment is for the jury, unless the danger was so plain and apparent that there could be no two opinions concerning it. *Christiansen v. McLellan.*..... 318
13. SAME—SAFE PLACE TO WORK—CHANGING CONDITIONS—ASSUMPTION OF RISKS. An employee driving a team on a street fill does not assume the risks from the ever changing conditions, and the master owes the duty to furnish a safe place, where he was present and personally directed the work and plaintiff was injured while driving down an unsafe place at the specific direction of the master. *Christiansen v. McLellan.*..... 318
14. SAME—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY. A signalman, without experience as a logger, is

MASTER AND SERVANT—CONTINUED.

not guilty of contributory negligence, and does not, as a matter of law, assume the risk of injury from the swinging of a log, while he was giving a signal from a stump on the bank six feet above the log in the ravine below, especially where he was following the general instructions of the foreman to give the signals from the nearest point. *Ostroski v. Blumauer Logging Co.*..... 672

15. MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—APPORTIONMENT UNDER FEDERAL ACT—QUESTION FOR JURY. Under § 3 of the Federal employers' liability act, providing that contributory negligence is not a defense but that the damages are to be diminished by the jury in proportion to the negligence attributable to the employee, contributory negligence and the apportionment of damages are for the jury. *Fogarty v. Northern Pac. R. Co.*.... 397
16. SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. In such a case, whether the plaintiff was guilty of contributory negligence in failing to proceed a foot or eighteen inches further before attempting to make the turn, or negligently lost control of his wheelbarrow before he reached the turn, were questions for the jury, where the evidence was conflicting; especially since slight negligence in failing to gauge his distance to a nicety would not preclude a recovery. *Lamoon v. Smith Cement Brick Co.*..... 164
17. MASTER AND SERVANT—INJURY TO SERVANT—PROXIMATE CAUSE—EVIDENCE—SUFFICIENCY. In an action for personal injuries to a blacksmith's helper, through the use of an improper style of tongs, which it was alleged could not safely hold the iron to be welded, the use of such tongs was not negligence nor the proximate cause of the accident, where it appears that the tongs used held the iron in position at the time of, and had nothing to do with, the cause of the accident. *Johnson v. Columbia & Puget Sound R. Co.*..... 417
18. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—PROXIMATE CAUSE—QUESTION FOR JURY. Whether the narrowness of a runway for wheeling concrete in wheelbarrows, was the proximate cause of injury to a servant who fell from the runway when his wheelbarrow struck a post, is a question for the jury, where the post protruded at a right angle turn, and witnesses testified that the runway was dangerous and too narrow to make the turn around the post with safety. *Lamoon v. Smith Cement Brick Co.*..... 164
19. SAME—RES IPSA LOQUITUR. In an action for personal injuries sustained by a blacksmith's helper who was struck when a piece of iron that was being welded by a steam hammer slipped out and fell, there can be no recovery on the ground of *res ipsa loquitur*, where there was nothing to show what caused the iron to slip and no proof of negligence; since it was necessary for plaintiff to show that it was caused by defective machinery or some extraordinary or

MASTER AND SERVANT—CONTINUED.

- negligent act under the control of the defendant. *Johnson v. Columbia & Puget Sound R. Co.*..... 417
20. **SAME — ACTIONS — COMPLAINT — ISSUES, PROOF AND VARIANCE.** A complaint against a railroad company based on the negligent maintenance of a defective switch is broad enough to admit of evidence that it had received notice that the switch was defective and negligently failed to inspect the same. *Raske v. Northern Pac. R. Co.* 155
21. **MASTER AND SERVANT—LIABILITY TO THIRD PERSONS—OWNERSHIP OF AUTOMOBILE—PRESUMPTIONS.** The ownership of an automobile is *prima facie* proof that it was in the possession of, and was being driven for, the owner. *Birch v. Abercrombie*..... 486
22. **SAME.** Where an automobile, purchased by defendant for the use of his family, was driven by his daughter for her own pleasure, the presumption that it was in his possession and used in his business is not overcome by evidence of mere advice and the expression of a preference on his part that she should not drive it; especially where, answering written interrogatories, he stated that she was permitted to, and had, run it on different occasions. *Birch v. Abercrombie* 486
23. **SAME—INJURY TO THIRD PERSONS—CHILD AS AGENT OF PARENT—DRIVING AUTOMOBILE—SCOPE OF EMPLOYMENT.** The owner of an automobile purchased for the use of his family, is liable to third persons for injuries sustained through the negligent driving of his daughter using the car for her own pleasure by his consent, express or implied; not by reason of the relation of parent and child, but through the relation of agency or service; since she was using it for the purposes for which it was kept, and in every just sense, in his business as his agent; and it is immaterial that no other member of the family was present. *Birch v. Abercrombie*..... 486

MATERIALITY:

Of alteration of note, see **ALTERATION OF INSTRUMENTS**, 1, 2. .

MATURITY:

Of debt, premature action to recover, see **ACTION**.

MEASURE OF DAMAGES:

See **DAMAGES**, 2, 3.

Injury to property from fill in street, see **EMINENT DOMAIN**, 2.

MECHANICS' LIENS:

1. **MECHANICS' LIENS—CONTRACTOR'S BOND — LIABILITY — GOODS RETURNED.** A contractor's liability upon an indemnity bond given pursuant to Rem. & Bal. Code, § 1159, conditioned to pay all laborers or

MECHANICS' LIENS—CONTINUED.

materialmen "all just debts, dues and demands incurred in the performance of the work" is not dependent upon his right to claim a lien under Id., § 1129; hence extends to materials ordered and sold in good faith but not actually used, where no right was reserved to return goods not actually used. *Crane Co. v. United States Fidelity & Guaranty Co.*..... 91

2. **MECHANICS' LIENS—NOTICE—DUPLICATE STATEMENTS—SUFFICIENCY—PREMATURE NOTICE—STATUTES—TIME OF TAKING EFFECT.** A duplicate statement of materials furnished for the construction of a building, mailed June 6, 1911, in compliance with, and one day prior to the taking effect of, Laws 1911, p. 376, § 1, amending the law relating to duplicate statements, was premature and ineffective for any purpose; since the amendatory act of 1911 was not retroactive, and the notice was not sufficient under the old law which required duplicate statements to be furnished with, and at the time of, each delivery. *Walker v. Lanning*..... 253

3. **MECHANICS' LIENS—WAIVER—TAKING PROMISSORY NOTE—PAYMENT—STATUTES—CONSTRUCTION.** Under Rem. & Bal. Code, § 1143, providing that a mechanics' lien is not waived or discharged by the taking of a promissory note, unless "expressly received as payment and so specified therein," a lien for installing an elevator in a building is not waived by the taking of a promissory note, under a contract which merely provided for payment "in terms of a promissory note" and which expressly reserved a lien "until final payment." *Llewellyn Iron Works v. Littlefield*..... 86

MEDICAL TREATMENT:

Election by employees to choose physician for, see **MASTER AND SERVANT**, 2.

MEMORANDA:

Required by statute of frauds, see **FRAUDS, STATUTE OF**.

MENTAL SUFFERING:

As element of damages, see **DAMAGES**, 1.

Damages for from unlawful entry and nuisance by landlord, see **LANDLORD AND TENANT**, 4.

METHOD OF WORK:

See **MASTER AND SERVANT**, 3.

MINES AND MINERALS:

Death of coal miner, see **MASTER AND SERVANT**, 5.

MISREPRESENTATION:

See **FRAUD**.

Inducing sale of corporate stock, see **CORPORATIONS**, 1-5.

MISREPRESENTATION—CONTINUED.

To relieve from estoppel to deny landlord's title, see **LANDLORD AND TENANT**, 1.

Inducing sale of automobile, see **SALES**, 1.

By vendor inducing sale, see **VENDOR AND PURCHASER**, 5-7.

MISTAKE:

Overpayment to contractor, recovery, see **MUNICIPAL CORPORATIONS**, 15.

MITIGATION:

Of damages by owner on default of contractor, see **INDEMNITY**, 3.

MODIFICATION:

Of decree of divorce, see **DIVORCE**, 5, 7-9.

Of assessment for public improvement, see **MUNICIPAL CORPORATIONS**, 20.

MONEY LENT:

1. **MONEY LENT—EVIDENCE—SUFFICIENCY.** In an action for money lent to one acting for himself and as agent for another with whom he was alleged to be in business, findings for the plaintiff are sustained as to only the active party, where there was no proof of partnership or agency or that the alleged principal ever obtained or used the money. *Thomas v. Lee*..... 286

MONEY PAID:

1. **MONEY PAID—RECOVERY—DEFENSES—EVIDENCE — SUFFICIENCY.** In an action to recover money paid to defendant as an advance on a loan plaintiff was making to him and another, it is no defense that defendant had signed an order for the payment of the advance "out of the money to be loaned," and that the loan was never made, where it appears that the loan was abandoned because of the refusal of one of the applicants to indorse the note, there was nothing in the agreement to show that the money was not to be repaid if the loan was not made, and the defendant received the money. *Knuppenberg v. Lee*..... 636

MONEY RECEIVED:

Recovery of price paid for goods, see **SALES**, 1.

Recovery of usury paid, see **USURY**.

MONTH:

Tenancy from month to month, see **LANDLORD AND TENANT**, 2, 6.

MORTGAGES:

Indemnity mortgage as debt of community estate, see **HUSBAND AND WIFE**, 7.

MORTGAGES—CONTINUED.

1. **MORTGAGES—ABSOLUTE DEED AND OPTION TO REPURCHASE—INTENT—EVIDENCE—SUFFICIENCY.** The rule requiring clear and convincing evidence that an absolute deed and option to repurchase were intended as a mortgage and not a sale, does not require the intent to appear on the face of the papers; and a mortgage is sufficiently established where it appears that property worth \$4,000, subject to a balance of \$2,000 due on a mortgage, was deeded in consideration of \$250, most of which was applied on overdue installments on the mortgage, and only \$7.50 paid to the grantor, that an option to repurchase within 30 days upon payment of \$325, was given by the grantee, who made a studied effort to evade the effect of the usury laws, and there was a direct conflict in the testimony of the parties as to whether a loan or a sale was made. *Hoover v. Bouffleur*..... 382
2. **MORTGAGES—INDEMNITY MORTGAGES—FORECLOSURE—PARTIES—NECESSARY PARTIES.** The foreclosure of an indemnity mortgage given by one of two partners, who was liable for the whole debt, will not be defeated for lack of parties after the debt was proven, the mortgage admitted, and no demand made that the partner be brought in as an additional party. *Bird v. Steele*..... 68

MUNICIPAL CORPORATIONS:

Condemnation of property, see **EMINENT DOMAIN**, 1-4, 6.

Ordinance restricting number of licenses in same block, see **INTOXICATING LIQUORS**, 1.

Refund of unearned portion of liquor license, see **INTOXICATING LIQUORS**, 2.

Licensing vehicles for hire, see **LICENSES**.

Mandamus to officers, see **MANDAMUS**, 2.

1. **MUNICIPAL CORPORATIONS — LEGISLATIVE POWERS — INITIATIVE AND REFERENDUM—ORDINANCES—TIME OF TAKING EFFECT.** Under Seattle city charter, art. 4, § 1, adopting the principle of direct legislation, and providing that ordinances may be referred to a vote of the people, either upon petition of voters or by the council acting without petition, the operation of an ordinance is suspended when submitted to a vote by the council, although the charter does not expressly so provide; since the principle of direct legislation would otherwise be violated. *Stetson v. Seattle*..... 606
2. **MUNICIPAL CORPORATIONS—LEGISLATIVE POWERS — INITIATIVE AND REFERENDUM—ORDINANCES—SUBMISSION—VALIDITY OF ELECTION.** Seattle charter, art. 4, § 1, adopting the principle of direct legislation, and providing that any ordinance may be submitted by the city council "by itself without petition," does not require that the ordinance shall call for its own submission, and it may be submitted by resolution. *Stetson v. Seattle*..... 606

MUNICIPAL CORPORATIONS—CONTINUED.

3. **SAME—POWERS OF COUNCIL—ORDINANCE—AMENDMENT—EFFECT AND NECESSITY OF REFERENDUM VOTE.** Under Seattle charter, art. 4, § 1, adopting the principle of direct legislation, and expressly superseding, in so far as conflicting therewith, par. 41 of § 18, art. 4, which gave the council the power to alter, amend or repeal any ordinance, the council has no power to alter, amend or repeal a referendum ordinance adopted by the people, but the same must be referred to the people under the simple referendum; especially where the referendum ordinance had not yet gone into effect pending the future date fixed by the people for it to take effect. *Stetson v. Seattle*..... 606

4. **SAME—EMPLOYEES—REGULATION OF HOURS OF SERVICE—STATUTES—CONSTRUCTION.** A referendum ordinance providing that employees in the marine fire department shall be divided into two platoons for day and night service, the hours for day service not to exceed ten, and for night service, not to exceed fourteen, must be construed as intended to fix the hours for service, and not merely the maximum, and is accordingly repugnant to an ordinance providing for three shifts and an eight-hour day for each shift. *Stetson v. Seattle*.. 606

5. **MUNICIPAL CORPORATIONS — FIRE DEPARTMENT — HOURS OF LABOR—REGULATIONS—STATUTES—CONSTRUCTION.** Under a Seattle city charter which does not classify the work of the fire department as public work, but excludes it from the jurisdiction of the board of public works, an employee of the fire department is not within art. 23, § 1, of the charter, providing that, in all public works done by the city either by day labor or by contract, eight hours shall constitute a day's labor; and such employee is not a day laborer or a mechanic, within an ordinance limiting the hours of all day laborers and mechanics employed upon any public works of the city to eight hours a day; nor within Rem. & Bal. Code, § 6572 *et seq.*, providing for an eight-hour day on all work done by contract on public works for municipalities, or subsequent state laws applying only to "work by contract or day labor done." *Stetson v. Seattle*..... 606

6. **MUNICIPAL CORPORATIONS—OFFICERS—REMOVAL—CIVIL SERVICE REGULATIONS—NECESSITY OF CHARGES.** Under a city charter providing for civil service, and that only day laborers may be removed without cause being shown, a "cross-walk foreman," which position had the attribute of permanency, cannot be removed without cause; and it is immaterial that the method of compensating for the services had been changed. *State ex rel. Cole v. Coates*..... 35

7. **MUNICIPAL CORPORATIONS—OFFICERS AND EMPLOYEES—CIVIL SERVICE—POWER TO ABOLISH OFFICE.** The abolishment of an office with several others in order to reduce the force in the interests of economy and combine the duties of several offices is not a removal from office, within the civil service rules; and hence an ordinance abolish-

MUNICIPAL CORPORATIONS—CONTINUED.

- ing an office is not invalid in that the duties of the office still remained and another ordinance provided that they should be performed by a clerk engaged a part of his time in other work. *State ex rel. Voris v. Seattle*..... 199
8. SAME—POWER TO ABOLISH OFFICE. The courts cannot inquire into the motives of a city council in abolishing an office within the civil service rules, if the ordinance is fair on its face and does no violence to any provisions of the charter or law. *State ex rel. Voris v. Seattle* 199
9. SAME—GOOD FAITH. An ordinance abolishing an office in order to reduce the force is not shown to have been passed in bad faith by the fact that the clerk upon whom the duties devolved received an increase in salary and was not able to keep up with his work, nor by testimony tending to show that the head of the department affected acted in bad faith; especially where the ordinance at the same time abolished four other positions and reduced the working force by five men. *State ex rel. Voris v. Seattle*..... 199
10. MUNICIPAL CORPORATIONS — STREETS — IMPROVEMENTS — REVIEW BY COURTS. The method of improving streets by lawful structures being a political question, the courts cannot interfere to direct the authorities as to the kind of gutters and curbs to place at a certain corner. *Maggs v. Seattle*..... 323
11. MUNICIPAL CORPORATIONS—CHARTERS—MINIMUM WAGE ON LOCAL IMPROVEMENTS—PUBLIC UTILITIES. A "local improvement" within the meaning of a charter amendment fixing a minimum wage to be paid by contractors performing any local improvement work for the city, has reference to a public improvement which, by reason of its being confined to a locality, enhances the value of adjacent property as distinguished from general benefits from public utilities; and hence has no application to the construction of a municipal railway system, built upon the credit of the whole city. *Jahn Contracting Co. v. Seattle* 298
12. MUNICIPAL CORPORATIONS—IMPROVEMENTS—PETITION — SIGNATURES — JURISDICTION TO ORDER IMPROVEMENT. That an initiatory petition for an improvement was not signed by a majority of the property owners, as required by the city charter, is not a jurisdictional defect where the charter also authorized the improvement without such signatures if ordered by a two-thirds vote of the council, and the council afterwards ordered the improvement by a unanimous vote. *Spokane v. Ridpath*..... 4
13. SAME—PROCEEDINGS—"RESOLUTION"—NECESSITY. A charter provision requiring a city council ordering an improvement to direct the board of public works, "by resolution" to prepare a report, is substantially complied with by ordering such report "on motion";

MUNICIPAL CORPORATIONS—CONTINUED.

- there being, in substance, no difference between a resolution and a motion. *Spokane v. Ridpath*..... 4
14. MUNICIPAL CORPORATIONS — IMPROVEMENTS — GRADING CONTRACT — CONSTRUCTION — PAYMENTS — BONDS — ACCRUED INTEREST. Where a grading contract provided that there should be delivered to the contractors bonds in the face amount of seventy per cent of the work done during the preceding calendar month as shown by monthly estimates, the contractors are not entitled to interest accrued between the date of the bonds and their delivery, although a budget ordinance directed payments to the contractor of bonds in the principal sum of seventy per cent of the monthly estimates and such additional sum as may be required to pay all interest that may legally accrue; since the contract required payment for work in bonds at their face value or par and not at a premium or bonus equal to the accrued interest at the time of delivery. *State ex rel. Grant Smith & Co. v. Seattle*..... 438
15. SAME—PAYMENTS BY CITY—AUTHORITY—MISTAKE—OVERPAYMENTS —RECOVERY—ESTOPPEL. In such a case, the fact that city officials delivered the bonds to contractors without detaching the coupons for interest accrued before delivery, does not estop the city from recovering the overpayment, or vest any right thereto in the contractors, on the theory that it was a voluntary payment or made under a mere mistake of law; since the payments were made by officials without authority and in violation of law. *State ex rel. Grant Smith & Co. v. Seattle*..... 438
16. MUNICIPAL CORPORATIONS—IMPROVEMENTS—DAMAGES TO ABUTTERS —CONTRACTORS—LIABILITY. A city contractor on a public improvement, using streets for a tramway by permission of the city, is not liable to abutting owners on account of temporary inconvenience or damage by reason of the prosecution of the work in a lawful manner, where the contractor was free from negligence. *Larned v. Holt & Jeffery* 274
17. MUNICIPAL CORPORATIONS — IMPROVEMENTS — CHANGE OF GRADE — BENEFITS—ELEMENT OF DAMAGES. In condemnation proceedings to ascertain the damages to abutting property from a change of street grade, the amount that such abutting property was assessed for the purpose of paying the cost of the work, as property especially benefited within the improvement district, is not an element of the damages sustained, and cannot be considered. *In re Harrison Street* 187
18. MUNICIPAL CORPORATIONS—IMPROVEMENTS — DAMAGES — CONTRIBUTORY NEGLIGENCE. It is not contributory negligence for the owner of a lot, injured by a slide by reason of the public improvement of a street, to excavate the lot to a street grade, which was reasonably necessary for the use of the lot. *Hinckley v. Seattle*..... 101

MUNICIPAL CORPORATIONS—CONTINUED.

19. SAME—ASSESSMENTS—VALIDITY—PRIOR EMINENT DOMAIN PROCEEDINGS—NECESSITY. The failure of a city to acquire, by eminent domain proceedings, the right to change the grade of a street, does not invalidate an assessment to defray the cost of making the improvement, and cannot be urged as a defense to an action to foreclose the lien of the assessment. *Spokane v. Ridpath*..... 4
20. MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—REVIEW BY COURTS. In the absence of evidence that an assessment roll, as levied by eminent domain commissioners upon property benefited, was not in accordance with the benefits received, the courts have no power to modify the assessment and charge part of the same against the general fund. *In re Elliott Avenue*..... 184
21. MUNICIPAL CORPORATIONS — STREETS—VACATION — EFFECT—NOTICE. An order of vacation of streets being a public record, is in legal effect an amendment of the plat and subsequent purchasers take with notice thereof. *Hagen v. Bolcom Mills*..... 462
22. SAME—VACATION—TITLE. Under Rem. & Bal. Code, § 7846, providing that on the vacation of a street, the same shall be attached to the lots bordering thereon, and that title shall vest in the persons owning the property on each side thereof in equal parts, title to a vacated street passes in fee simple to one owning all the land on both sides of the street. *Hagen v. Bolcom Mills*..... 462
23. SAME—TITLE TO VACATED STREETS—STATUS AS DISTINCT TRACT—DEED OF ABUTTING LOTS—EFFECT. Where, by the vacation of a street, the owner of all the land on both sides of the street acquired the title to the street, and conveyed the whole property describing the street as a distinct parcel, its future status as such is fixed, and the conveyance is notice to all subsequent grantees in the chain of title that the street is to be treated as a separate tract which does not pass, by a subsequent conveyance of abutting lots; since the owner could fix its status and convey it apart from the lots, land is not appurtenant to land, and subsequent purchasers do not buy with reference to a platted street where there is none at the time of their purchase. *Hagen v. Bolcom Mills*..... 462
24. MUNICIPAL CORPORATIONS—USE OF STREETS—AUTOMOBILES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The negligence of the driver of an automobile in running down a pedestrian, and the contributory negligence of the plaintiff, is for the jury, where the plaintiff looked before starting across the street and the street was clear of traffic for one block and no car in sight, and the evidence was conflicting as to whether the driver sounded a warning until just before striking the plaintiff. *Birch v. Abercrombie*... 486
25. MUNICIPAL CORPORATIONS—POWERS—FUNDS—PURCHASE OF LANDS—PAYMENT. Under Rem. & Bal. Code, § 7685, providing that a city

MUNICIPAL CORPORATIONS—CONTINUED.

- of the third class shall have power to purchase land for a cemetery, and to levy a tax from the general fund not exceeding sixty cents on each one hundred dollars, the purchase price of a cemetery becomes a charge upon the general fund, in the absence of any special provision calling for payment from some other fund. *State ex rel. Adams v. Irwin*..... 589
26. SAME—INDEBTEDNESS—LIMITATIONS. Lack of money in the general fund to meet a liability, is not a valid objection to incurring the liability, when the constitutional limit of indebtedness is not exceeded. *State ex rel. Adams v. Irwin*..... 589
27. MUNICIPAL CORPORATIONS — CLAIMS — “SOUNDING IN TORT”—EMINENT DOMAIN—COMPENSATION FOR PROPERTY TAKEN. The right to recover compensation for property taken by a city for public use under Const., art. 1, §16, is not a claim “sounding in tort” within Rem. & Bal. Code, § 7995, requiring claims against a city for damages sounding in tort to be presented as a condition precedent to action; since the city in taking property acts in its sovereign capacity and not as a wrongdoer or trespasser, strictly speaking, and the constitutional guarantee of compensation cannot be made to depend on statute law. *Kincaid v. Seattle*..... 617
28. SAME—CLAIMS—COMPENSATION FOR PROPERTY TAKEN. The right to recover compensation for property taken by a city for public use under Const., art. 1, § 16, is not a claim for damages or a contract claim within Seattle charter, art. 4, § 29, requiring all claims for damages against the city to be presented as a condition precedent to action; since the constitutional right to compensation cannot be so taken away. *Kincaid v. Seattle*..... 617
29. MUNICIPAL CORPORATIONS—CLAIMS—ACTIONS — CONDITIONS PRECEDENT—WAIVER. The requirement that a claim against a city for damages sounding in tort shall be verified and shall state the residence of the claimant is made mandatory by Rem. & Bal. Code, §§ 7996, 7997, and therefore a condition precedent to action, which cannot be waived by the city. *Kincaid v. Seattle*..... 617
30. MUNICIPAL CORPORATIONS — CLAIMS — PRESENTATION — NECESSITY. Seattle charter, art. 4, § 29, requiring “all claims for damages” to be filed, as a condition precedent to action, includes claims for damages arising out of breach of contract when proof of damages independent of the contract must be made; notwithstanding that other portions of the section respecting the details of the notice are applicable only to claims for personal injuries. *International Contract Co. v. Seattle*..... 662
31. SAME—TIME FOR FILING—ACCRUAL OF DAMAGES. Under Seattle charter, art. 4, § 29, requiring all claims for damages to be filed with-

MUNICIPAL CORPORATIONS—CONTINUED.

in thirty days after the damages accrue, the time for filing a claim for breach of contract does not begin to run from the date of a refusal to pay damages, but from the time of the actual accrual thereof. *International Contract Co. v. Seattle*..... 662

MURDER:

See HOMICIDE.

MUTUALITY:

Of contract, see CONTRACTS, 1.

NAMES:

See TRADE-MARKS AND TRADE-NAMES.

Of owners in summons, see TAXATION, 4.

NECESSITY:

Of motion for new trial for purpose of review, see APPEAL AND ERROR, 5.

Of written order from architect for extras, see CONTRACTS, 7.

Of wife joining in husband's deed to separate property, see HUSBAND AND WIFE, 6.

Of referendum vote to amend or repeal ordinance, see MUNICIPAL CORPORATIONS, 3.

Of charges showing cause for removal of officer, see MUNICIPAL CORPORATIONS, 6.

Of "resolution" directing board of public works to prepare report on improvement, see MUNICIPAL CORPORATIONS, 13.

Of eminent domain proceedings to acquire right to change grade of street, see MUNICIPAL CORPORATIONS, 19.

Presenting claim for damages for breach of contract, see MUNICIPAL CORPORATIONS, 30.

NEGLIGENCE:

Measure of damages, see DAMAGES, 2, 3.

Of driver of automobile, see HIGHWAYS, 3; MUNICIPAL CORPORATIONS, 24.

Of fellow servant, see MASTER AND SERVANT, 8, 9.

Contributory negligence of servant as question for jury, see MASTER AND SERVANT, 10, 14-16.

NEGOTIABLE INSTRUMENTS:

See BILLS AND NOTES.

NEWLY DISCOVERED EVIDENCE:

Ground for new trial in civil actions, see NEW TRIAL.

NEWSPAPERS:

Libel, see LIBEL AND SLANDER.

NEW TRIAL:

Necessity of motion for purpose of review, see **APPEAL AND ERROR**, 5.
 Surprise by testimony of opposing party, as ground for, see **CONTINUANCE**.

In criminal prosecutions, see **CRIMINAL LAW**, 8.

1. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE—SURPRISE—DILIGENCE.**

A new trial for newly discovered evidence is properly denied, where the new witnesses denied that they would testify as claimed; and their evidence was sought to meet evidence of the plaintiff showing the effect of her personal injuries subsequent to the first trial of the action, which was introduced at a second trial without objection to its relevancy or any claim of surprise. *Field v. Spokane, Portland and Seattle R. Co.*..... 356

NOTES:

Promissory notes, see **BILLS AND NOTES**.

NOTICE:

Of appeal, see **APPEAL AND ERROR**, 7.

Of alteration in note, see **BILLS AND NOTES**, 3.

To effect rescission of stock subscription, see **CORPORATIONS**, 4.

Final settlement of estate, see **EXECUTORS AND ADMINISTRATORS**, 2.

From conditional vendor to rely on protection of sales-in-bulk act, see **FRAUDULENT CONVEYANCES**, 1.

Of motion for default, see **JUDGMENT**, 1.

To owner of materials furnished for building, see **MECHANICS' LIENS**, 2.

Vacation of street, see **MUNICIPAL CORPORATIONS**, 21.

Claims for damages, see **MUNICIPAL CORPORATIONS**, 27-31.

To agent as affecting principal, see **PRINCIPAL AND AGENT**.

Tax foreclosure suit, see **TAXATION**, 2.

Purchaser of real property, see **VENDOR AND PURCHASER**, 12.

NUISANCE:

1. **NUISANCE—PRIVATE NUISANCES—SMOKE AND SOOT—LIABILITY—RELIEF.** Where smoke, soot, and fumes from a gas manufacturing plant were cast upon plaintiff's residence property to such an extent as to become the direct cause of substantial discomfort and inconvenience and to materially diminish its earning power, the plaintiff is entitled to an injunction and to damages for the losses sustained. *Lavner v. Independent Light & Water Co.*..... 373

OBJECTIONS:

Necessity for purpose of review, see **APPEAL AND ERROR**, 2.

To assessment for public improvements, see **MUNICIPAL CORPORATIONS**, 20.

To evidence, see **TRIAL**, 3.

To venue, see **VENUE**.

OCCUPATION:

City license tax on occupations, see LICENSES.

OFFICERS:

See JUSTICES OF THE PEACE.

Corporate officers, see CORPORATIONS, 8.

Official interest as affecting appointment of as umpire, see HIGHWAYS, 2.

Mandamus affecting, see MANDAMUS, 2.

Municipal officers, see MUNICIPAL CORPORATIONS, 6-9, 15.

OPEN AND CLOSE:

Right of state where defense is insanity, see CRIMINAL LAW, 3.

OPENING:

Judgment, see JUDGMENT, 2, 3.

OPINION EVIDENCE:

In civil actions, see EVIDENCE, 4.

ORAL CONTRACTS:

See FRAUDS, STATUTE OF.

ORDERS:

Review of, see APPEAL AND ERROR, 1, 6.

Necessity for written order from architect for extras, see CONTRACTS, 7.

ORDINANCES:

Construction of ordinance restricting number of liquor licenses in block, see INTOXICATING LIQUORS, 1.

Municipal ordinances, see MUNICIPAL CORPORATIONS, 1-5, 7-9.

OWNERSHIP:

Of vehicle as question for jury, see HIGHWAYS, 3.

Of automobile, presumptions from, see MASTER AND SERVANT, 21, 22.

PARENT AND CHILD:

See GUARDIAN AND WARD.

Custody and support of children on divorce, see DIVORCE, 7-9.

Liability of parent for negligent driving of automobile by child, see MASTER AND SERVANT, 23.

PAROL CONTRACTS:

See FRAUDS, STATUTE OF.

PAROL EVIDENCE:

To show representative capacity of makers of note, see CORPORATIONS, 8.
In civil actions, see EVIDENCE, 3.

PARTIES:

Rights and liabilities as to costs, see COSTS.
Persons entitled to sue for causing death, see DEATH.
Entitled to compensation, see EMINENT DOMAIN, 3-5.
Persons concluded by judgment, see JUDGMENT, 5.
Foreclosure, see MORTGAGES, 2.
Persons entitled to relief by prohibition, see PROHIBITION.
Entitled to performance of contract, see SPECIFIC PERFORMANCE, 1.

1. PARTIES—NECESSARY PARTIES—DEMAND FOR A DEED. Objection that a married man cannot maintain an action to obtain a tax deed without joining his wife is waived where it is not raised by demurrer or answer, under Rem. & Bal. Code, §§ 261-263. *State ex rel. Abraham v. Terry*..... 208

PASSENGERS:

Carriage of, see CARRIERS.

PAYMENT:

Indorsement of fictitious payment on back of note as material alteration, see ALTERATION OF INSTRUMENTS, 1, 2.
Medium of payment on performance of contract, see CONTRACTS, 5.
Of dividends from capital stock, see CORPORATIONS, 6.
Compensation for property taken or damaged for public use, see EMINENT DOMAIN, 3, 4.
Of judgment by surety as evidence of damages sustained, within indemnity contract, see INDEMNITY, 1.
Taking promissory note as waiver of lien, see MECHANICS' LIENS, 3.
Recovery for money paid, see MONEY PAID.
Minimum wage paid by contractor on local improvement work, see MUNICIPAL CORPORATIONS, 11.
Delivery of bonds to contractor, right to interest, see MUNICIPAL CORPORATIONS, 14, 15.
Liability of general fund to pay for land purchased by city for cemetery, see MUNICIPAL CORPORATIONS, 25.
Subrogation on payment, see SUBROGATION.
Recovery of usury paid, see USURY.
Price of land sold, see VENDOR AND PURCHASER, 2-4, 6, 9, 11.

1. PAYMENT—APPLICATION—SECURED DEBTS. Where a contractor has an open account with a materialman for goods supplied for various jobs, payments made without any directions as to their application may be applied by the materialman as he sees fit, and need not be applied to a debt secured by an indemnity bond. *Orane Co. v. United States Fidelity & Guaranty Co.*..... 91

PENALTIES:

Excessive penalties for violation of rate regulation by street railroad, see **CARRIERS**.

PERFORMANCE:

Of contract entitling broker to commission, see **BROKERS**, 1.

Of contract, see **CONTRACTS**, 9, 10.

Part performance of oral agreement, see **FRAUDS, STATUTE OF**, 4.

Of contract for land, see **VENDOR AND PURCHASER**, 10, 11.

PERSONAL INJURIES:

Damages for, see **DAMAGES**, 2, 3.

Relevancy of evidence in action for, see **EVIDENCE**, 2.

To traveler on highway, see **HIGHWAYS**, 3, 4.

Indemnity insurance against loss suffered through prosecution of public work, see **INSURANCE**, 2.

To employee, see **MASTER AND SERVANT**.

To person on city street, see **MUNICIPAL CORPORATIONS**, 24.

PETITION:

To modify decree as to custody of children, see **DIVORCE**, 9.

To submit ordinance to referendum vote, see **MUNICIPAL CORPORATIONS**, 1, 2.

For public improvement, see **MUNICIPAL CORPORATIONS**, 12.

PHYSICIANS AND SURGEONS:

Employment of physician for employees, see **MASTER AND SERVANT**, 2.

PLEADING:

Amendments on appeal, see **APPEAL AND ERROR**, 13, 14.

Harmless error in rulings on, see **APPEAL AND ERROR**, 24.

On note, see **BILLS AND NOTES**, 2.

Election contest, see **ELECTIONS**, 2, 3.

Statute of frauds, see **FRAUDS, STATUTE OF**, 5.

Indictment or criminal information or complaint, see **INDICTMENT AND INFORMATION**.

In action against incompetent, see **INSANE PERSONS**, 2.

In action by tenant for unlawful entry of landlord, see **LANDLORD AND TENANT**, 6.

Application for mandamus, see **MANDAMUS**, 4.

Complaint for personal injuries, see **MASTER AND SERVANT**, 20.

1. PLEADING—ANSWER—ARGUMENTATIVE DENIALS—BURDEN OF PROOF.

In an action for a balance due on a shipment of strawberries sold to defendant, a so-called affirmative defense setting up that the defendant received them on consignment and sold them for plaintiff's account for the best price obtainable, adds nothing to defendant's general denial of a sale to him, and does not put upon defend-

PLEADING—CONTINUED.

ant the burden of proving the consignment. *Davidson Fruit Co. v. Produce Distributors Co.*..... 551

POLICY:

Of insurance, see **INSURANCE**.

POSSESSION:

As notice, see **VENDOR AND PURCHASER**, 12.

POWERS:

Of regents to dispose of university lands, see **COLLEGES AND UNIVERSITIES**.

Of court over guardian *ad litem*, see **INFANTS**.

Of city council to refund unearned portion of liquor license, see **MUNICIPAL CORPORATIONS**, 2.

Of council to amend or repeal referendum ordinance, see **MUNICIPAL CORPORATIONS**, 3.

Of city to abolish office, see **MUNICIPAL CORPORATIONS**, 7, 8.

Of city to purchase land for cemetery, see **MUNICIPAL CORPORATIONS**, 25, 26.

Of land commissioners to dispose of university lands, see **PUBLIC LANDS**, 1.

Of Federal court over guardian *ad litem*, see **REMOVAL OF CAUSES**.

PRACTICE:

See **APPEAL AND ERROR**; **CERTIORARI**; **CONTINUANCE**; **COSTS**; **DAMAGES**; **DIVORCE**; **JUDGMENT**; **MANDAMUS**; **NEW TRIAL**; **PARTIES**; **REMOVAL OF CAUSES**; **TRIAL**.

In justices' courts, see **JUSTICES OF THE PEACE**.

PREJUDICE:

Ground for reversal in civil actions, see **APPEAL AND ERROR**, 24.

Ground for new trial, see **CRIMINAL LAW**, 8.

PREMIUMS:

For insurance, see **INSURANCE**, 1.

PRESCRIPTION:

Establishment of highways, see **HIGHWAYS**, 1.

PRESENTMENT:

Of claims for damages, see **MUNICIPAL CORPORATIONS**, 27-31.

PRESUMPTIONS:

As to damages suffered by surety in replevin bond, see **INDEMNITY**, 1.

As to personal service from recitals in judgment, see **JUDGMENT**, 4.

From ownership of automobile, see **MASTER AND SERVANT**, 21, 22.

PRINCIPAL AND AGENT:

See **BROKERS**.

Corporate officers and agents, see **CORPORATIONS**, 8.

Child driving automobile as agent of parent, see **MASTER AND SERVANT**, 23.

Subrogation to rights of agent, see **SUBROGATION**, 2.

1. **PRINCIPAL AND AGENT—SCOPE OF AGENCY—NOTICE TO AGENT.** Notice of the retirement of a member of a firm, given to a collector, is outside the apparent scope of his employment and therefore not notice to his principal, where his authority was limited and special, he had no power to arrange terms or extend credit and was vested with no discretion. *Schwabacher Brothers & Co. v. Murphine*... 388

PRINCIPAL AND SURETY:

See **BONDS; INDEMNITY**.

1. **PRINCIPAL AND SURETY—DISCHARGE OF SURETY—ALTERATIONS—CONSENT.** A surety company guaranteeing the performance of a building contract is not relieved from liability by reason of material changes in the contract, where it had notice of the changes and consented thereto; especially where the only damages allowed were those resulting from liens and defective construction. *Wiley v. Hart*.. 142

PROCESS:

In action against incompetent, see **INSANE PERSONS**.

Conclusiveness of recitals in judgment as to due service of notice, see **JUDGMENT**, 4.

Notice of tax foreclosure proceeding, see **TAXATION**, 2, 4, 5.

PROHIBITION:

1. **PROHIBITION — To COURTS — INADEQUACY OF REMEDY BY APPEAL.** Where a defendant in a divorce case appealed from an order for temporary alimony and attorney's fees, and gave a supersedeas bond fixed and approved by the court, prohibition lies to prevent enforcement of the order by contempt proceedings; since there is no adequate remedy by appeal. *State ex rel. Surry v. Superior Court* 689

PROMISE:

To repair defective appliance, see **MASTER AND SERVANT**, 11.

PROMISSORY NOTES:

See **BILLS AND NOTES**.

Premature action to recover installment on note, see **ACTION**.

PROPERTY:

Diversion of on secession of lodge, see **BENEFICIAL ASSOCIATIONS**.

Dedication to public use, see **DEDICATION**.

PROPERTY—CONTINUED.

- Taking or damaging for public use, see EMINENT DOMAIN.
- Separate or community nature of, see HUSBAND AND WIFE, 3-5, 7.
- School funds, investment, see SCHOOLS AND SCHOOL DISTRICTS, 1.

PROSTITUTION:

- See INDICTMENT AND INFORMATION, 4.
- Impeaching testimony of prosecutrix, see WITNESSES, 3, 4.
- 1. PROSTITUTION—ACCEPTING EARNINGS—ELEMENTS OF OFFENSE. One renting rooms to a common prostitute is guilty of accepting her earnings within Rem. & Bal. Code, § 2440, where, in addition to the room rent, he was paid a specific sum for the privilege of each act of prostitution committed on the premises. *State v. Columbus*..... 290
- 2. PROSTITUTION—ACCEPTING EARNINGS OF PROSTITUTE—INFORMATION. An information charging defendants with accepting the earnings of one M. B., a common prostitute, charges the offense practically in the language of the statute, Rem. & Bal. Code, § 2440, making it unlawful to live with, or accept any earnings of, a common prostitute, and is sufficient. *State v. Columbus*..... 290
- 3. PROSTITUTION — ACCEPTING EARNINGS OF PROSTITUTE — EVIDENCE—CORROBORATION—SUFFICIENCY. On a prosecution for accepting the earnings of a common prostitute, corroboration of her testimony, within the requirement of Rem. & Bal. Code, § 2443, by another prostitute is sufficient; especially where other witnesses testified to payments and other circumstances tending to show the relations charged. *State v. Columbus*..... 290

PROVINCE OF COURT AND JURY:

- In civil actions, see TRIAL, 4, 5.

PROXIMATE CAUSE:

- Of injury to servant, see MASTER AND SERVANT, 17, 18.

PUBLICATION:

- Of libel by nonresident, see LIBEL AND SLANDER.

PUBLIC DEBT:

- Limitations, see MUNICIPAL CORPORATIONS, 26; STATES.

PUBLIC IMPROVEMENTS:

- By municipalities, see MUNICIPAL CORPORATIONS, 10-14, 16-20.

PUBLIC LANDS:

- See COLLEGES AND UNIVERSITIES.
- Acquired by husband as separate property, see HUSBAND AND WIFE, 3.
- 1. PUBLIC LANDS — UNIVERSITY LANDS — PRIVATE DEEDS TO STATE — POWER OF DISPOSAL—STATUTES—CONSTRUCTION. Lands deeded to the

PUBLIC LANDS—CONTINUED.

- territorial board of regents of the university are "public lands" within the constitution and laws of the state, empowering the state board of land commissioners to dispose of the same; in view of the comprehensive acts of 1893, p. 387, authorizing the first land commission to dispose of all public lands granted to the state . . . for university and all other educational purposes not appropriated to any specific public use, and Laws 1895, p. 527, § 1, including therein all lands acquired by deed of sale or gift; and Laws 1895, p. 107, § 1, creating a university fund to be derived from the proceeds of all granted lands and all lands acquired by the university by purchase or donation. *State v. Hewitt Land Co.* 573
2. PUBLIC LANDS—SALE—"GRANTED LANDS." Const., art. 16, § 4, providing that no more than 160 acres of any granted lands of the state shall be offered for sale in one parcel, has application to lands granted by the United States for public institutions, common schools etc., and not to private grants by individuals. *State v. Hewitt Land Co.* 573
3. PUBLIC LANDS — SALE — DEED FROM STATE—VALIDITY—IRREGULARITIES. A state deed of more than 160 acres of university lands, sold in one parcel in violation of Laws 1897, p. 235, is an irregularity only and not void, as between the state and subsequent innocent purchasers for value, where there was no fraud and the law did not provide that such sale would be void, the limitation of the constitution against sales of more than 160 acres in one parcel applying only to lands acquired by Federal grant. *State v. Hewitt Land Co.* 573
4. PUBLIC LANDS—TIDE LANDS—PREFERENCE RIGHTS—AWARD—FINALITY—APPEAL. Under Laws 1895, p. 527, giving abutters the preference right to purchase tide lands if there are no conflicting applications, and providing that in case of conflict the board of state land commissioners shall order a hearing upon sworn statements and certify its order to the commissioner of public lands, abutters have no vested preference right by virtue of an order granting their applications, where it appears that such order was not final and was not certified to the commissioner because of conflicting applications, that the board retained jurisdiction, gave notice of the contest and required statements, which were not filed, and finally denied the applications for want of proof of ownership, upon which no appeal was taken as required by law. *Kinnear v. Ross.* 391
5. SAME — PROCEEDINGS — WAIVER OF RIGHT — FAILURE TO APPEAL. Under Laws 1895, p. 527, upon the denial of the preference right of abutters to purchase tide lands, after a hearing before the board of state land commissioners, the remedy is by appeal to the superior court, failing which, the abutters must be held to have acquiesced in the final disposition of their applications. *Kinnear v. Ross.* . . 391

PUBLIC LANDS—CONTINUED.

6. **SAME—PREFERENCE RIGHTS—LACHES.** Abutters are estopped by laches to claim the preference right to purchase tide lands, where for more than ten years after their right accrued they failed to make any demand for a deed or tender the purchase price. *Kinnear v. Ross* 391

PUBLIC SCHOOLS:

See **SCHOOLS AND SCHOOL DISTRICTS.**

PUBLIC USE:

Dedication of property, see **DEDICATION.**

Taking property for public use, see **EMINENT DOMAIN.**

PUNISHMENT:

Failure to pay alimony, see **DIVORCE**, 6.

QUESTION FOR JURY:

Ownership of vehicle causing damage through collision, see **HIGHWAYS**, 3.

In actions for injuries to servants, see **MASTER AND SERVANT**, 3, 4, 6-12, 14-16, 18.

Negligence causing injury to person struck by automobile, see **MUNICIPAL CORPORATIONS**, 24.

Question for in civil action, see **TRIAL**, 4, 5.

RAILROADS:

Violation of rate regulation by street railroad, see **CARRIERS.**

As employers, see **MASTER AND SERVANT**, 3, 4, 15, 17, 19, 20.

RATE:

Violation of rate regulations, by street railroad, see **CARRIERS.**

REAL ESTATE AGENTS:

See **BROKERS.**

REAL PROPERTY:

Standing timber as "real estate," see **FRAUDS, STATUTE OF**, 1.

Allowance of interest in action for damages to by breach of re-grading contract, see **INTEREST.**

REBATING:

Contract for insurance at reduced rate, see **INSURANCE**, 1.

RECITALS:

In judgment as to service, see **JUDGMENT**, 4.

RECORDS:

On appeal, see **APPEAL AND ERROR**, 4, 9-12.

Recording conditional bill of sale, see **SALES**, 2.

RECOUNT:

Of ballots for malconduct of officers, see **ELECTIONS**.

REDEMPTION:

From tax sale, see **TAXATION**, 7.

REDUCTION:

Indorsement reducing sum payable in note as material alteration, see **ALTERATION OF INSTRUMENTS**, 1, 2.

REFUND:

Unearned portion of liquor license, see **INTOXICATING LIQUORS**, 2.

REGENTS:

Power to dispose of university lands, see **COLLEGES AND UNIVERSITIES**.

REGULATION:

Violation of rate regulations by street railroad, see **CARRIERS**.

Licenses for sale of liquor, see **INTOXICATING LIQUORS**, 1.

Hours of service for employees, see **MUNICIPAL CORPORATIONS**, 4, 5.

RELEASE:

1. **RELEASE—FRAUD—EVIDENCE—DEFENSE.** An admitted written release, in consideration of \$150, is a complete defense to an action for damages where there was no proof of fraud, undue influence or want of understanding; and the court is warranted in directing a verdict for defendant. *Trovik v. Grant Smith & Co.*..... 272

RELEVANCY:

Of evidence in civil actions, see **EVIDENCE**, 2.

REMAND:

Of cause on appeal or writ of error, see **APPEAL AND ERROR**, 27, 28.

REMOVAL:

Of building by tenant, see **LANDLORD AND TENANT**, 5.

From office, see **MUNICIPAL CORPORATIONS**, 6, 7.

REMOVAL OF CAUSES:

Change of venue or place of trial, see **VENUE**.

1. **REMOVAL OF CAUSES—EFFECT—GUARDIAN AD LITEM.** After the removal of a cause from the state court to the Federal court, the latter becomes completely possessed of the action and has plenary power over the guardian *ad litem* of the plaintiff; and thereafter certiorari to review an earlier order of the state court in substituting a new guardian *ad litem* does not lie; the remedy, if any, being by application to the Federal court. *State ex rel. Barnard v. Superior Court* 559

RENDITION:

Of judgment, see JUSTICES OF THE PEACE, 1.

RENT:

See LANDLORD AND TENANT, 7.

REPEAL:

Implied repeal of laws empowering university regents to hold and acquire real estate, see COLLEGES AND UNIVERSITIES, 1.

REPLEVIN:

Indemnifying surety in replevin bond for damages suffered, see INDEMNITY, 1, 2.

REPRESENTATION:

Of corporation by officers or agents, see CORPORATIONS, 8.

RESCISSION:

Of stock subscription for fraud, see CORPORATIONS, 4, 5.

Of contract of sale, see SALES, 2.

Of contract for sale of land, see VENDOR AND PURCHASER, 2-8.

RESIDENCE:

Nonresident publisher of libel, see LIBEL AND SLANDER.

As fixing venue of action, see VENUE.

RES IPSA LOQUITUR:

See MASTER AND SERVANT, 19.

RES JUDICATA:

See EMINENT DOMAIN, 6; JUDGMENT, 5-7.

RESOLUTION:

Submission of ordinance to referendum vote, see MUNICIPAL CORPORATIONS, 2.

To board of public works to prepare report on public improvement, see MUNICIPAL CORPORATIONS, 13.

RESTAURANTS:

Unfair competition, see TRADE-MARKS AND TRADE-NAMES.

REVENUE:

See TAXATION.

REVIEW:

See APPEAL AND ERROR; CERTIORARI; JUSTICES OF THE PEACE, 2.

In criminal prosecution, see CRIMINAL LAW, 9, 10.

Mandamus to review judicial action, see MANDAMUS, 1.

REVIEW—CONTINUED.

Of method of improving streets, see MUNICIPAL CORPORATIONS, 10.

Assessments for public improvements, see MUNICIPAL CORPORATIONS, 20.

REVOCATION:

Of appointment of guardian *ad litem*, see INFANTS.

Of liquor license, refund of unearned portion, see INTOXICATING LIQUORS, 2.

RISKS:

Assumed by employee, see MASTER AND SERVANT, 10-14.

ROADS:

See HIGHWAYS.

Streets in cities, see MUNICIPAL CORPORATIONS, 10, 16-19, 21-24.

SAFE PLACE TO WORK:

See MASTER AND SERVANT, 5, 13.

SALES:

Of property by broker, see BROKERS.

Of corporate stock, see CORPORATIONS, 1-7.

Requirements of statute of frauds, see FRAUDS, STATUTE OF, 1-4.

In fraud of creditors, see FRAUDULENT CONVEYANCES.

Of intoxicating liquors, see INTOXICATING LIQUORS.

Of state lands, see PUBLIC LANDS.

Tax sales, see TAXATION.

Of realty, see VENDOR AND PURCHASER.

1. SALES—WARRANTY—BREACH — EVIDENCE — SUFFICIENCY. The purchaser cannot recover for breach of warranty of an automobile in that it did not meet representations as to its quality, where both she and the son testified that it was in proper condition when purchased and not materially out of repair when returned. *Woods v. McIvor* 359
2. SALES—CONDITIONAL SALES—RECORDING—BONA FIDE PURCHASER—TITLE. A sale of an automobile cannot be rescinded by the purchaser on the ground that the seller was without title, holding only by a conditional bill of sale, where the conditional bill of sale had not been recorded, since the purchaser was protected by the statute. *Woods v. McIvor*..... 359
3. SALES—CONDITIONAL SALES—RETAKING PROPERTY—EVIDENCE—SUFFICIENCY. Findings that the vendor of a soda fountain under a conditional sales contract had elected to retake the same and cancel the debt, are sustained where it appears that shortly after the vendee had sold out his business to a third party, the vendor attempted to sell

SALES—CONTINUED.

it to such third party, and made arrangements to have it boxed up and shipped back, and delayed for some time making claim upon such third party for its price as a garnishee under the sales-in-bulk act, until the garnishee had paid up the vendee in full. *Stewart & Holmes Drug Co. v. Reed*..... 401

4. **SAME—RETAKING PROPERTY—ELECTION.** An election by the vendor to retake property conditionally sold, finally precludes the assertion of remedies under the contract; and the election may be invoked by a third person in defense of the assertion of such remedies against him. *Stewart & Holmes Drug Co. v. Reed*..... 401

SCHOOL LANDS:

See PUBLIC LANDS, 1-3.

SCHOOLS AND SCHOOL DISTRICTS:

1. **SCHOOLS AND SCHOOL DISTRICTS — SCHOOL FUNDS — INVESTMENT—STATE BONDS.** Under Const., art. 16, § 5, and Rem. & Bal. Code, § 5056, authorizing the investment of the permanent school fund in state bonds, the investment cannot be made in state capitol building bonds issued against the capitol building fund to be derived from the sale of the capitol lands, unless the general credit of the state is lawfully pledged to the payment of the principal and interest of the bonds. *State Capitol Commission v. State Board of Finance*.... 15
2. **SCHOOLS AND SCHOOL DISTRICTS — CONSOLIDATION OF DISTRICTS — STATUTES—CONSTRUCTION.** School districts forming units in separate union high school districts cannot be consolidated, under Rem. & Bal. Code, §§ 4440 to 4459, in view of the fact that such a consolidated district, being a new and distinct entity, would render uncertain the provisions of §§ 4460-4469, relating to high school districts. *State ex rel. Bell v. Thaanum*..... 58

SELF-DEFENSE:

See HOMICIDE, 2, 3.

SEPARATE ESTATE:

Of husband, see HUSBAND AND WIFE, 3-6. /
Of married women, see HUSBAND AND WIFE, 4.

SERVICE:

Of summons in action against incompetent, see INSANE PERSONS.
Conclusiveness of recitals in judgment as to due service of notice, see JUDGMENT, 4.

SET-OFF AND COUNTERCLAIM:

Set-off by vendee in payment of contract, see VENDOR AND PURCHASER, 3, 4.

SETTLEMENT:

By executor or administrator, see **EXECUTORS AND ADMINISTRATORS**, 3-6

By guardian of infant, see **GUARDIAN AND WARD**.

Of claim for personal injuries, see **RELEASE**.

SIGNATURES:

To petition for improvement, see **MUNICIPAL CORPORATIONS**, 12.

SLANDER:

See **LIBEL AND SLANDER**.

SPECIFICATIONS:

Conditions in as part of contract, see **CONTRACTS**, 3.

SPECIFIC PERFORMANCE:

1. **SPECIFIC PERFORMANCE—PARTIES ENTITLED—PARTIES IN DEFAULT.** Where time is the essence of the contract, specific performance will not be decreed at the suit of a vendee in default not acquiesced in by the vendor. *Benham v. Columbia Canal Co.*..... 110
2. **SPECIFIC PERFORMANCE—DEFENSES—ASSIGNMENT.** An assignment by the vendee of a land contract to secure or in payment of a physician's bill does not defeat specific performance on behalf of the personal representatives of the deceased vendee, where the physician claimed nothing under the assignment but filed his bill with the administrator and took judgment for the amount due him. *Shorett v. Knudsen* 448
3. **SPECIFIC PERFORMANCE—DEFENSES—LACHES.** Specific performance of a contract for the sale of land is not barred by laches, through mere lapse of time, where the vendee was in possession and paid taxes up to the time of his death. *Shorett v. Knudsen*..... 448
4. **SPECIFIC PERFORMANCE—DEFENSES—DELAY—EFFECT.** Specific performance of a contract to convey land in consideration of services rendered will not be defeated by long delay in completing performance, during which time the land had greatly increased in value, where the contractor prosecuted the work in good faith and the owners acquiesced in the delay and urged completion of the work, and the owners were in no way prejudiced. *Richardson v. Sears*. 499

SPECULATIVE DAMAGES:

Loss of prospective surgical operation, see **HIGHWAYS**, 4.

STATEMENT:

Of case or facts for purpose of review, see **APPEAL AND ERROR**, 9-12.

Certiorari to review order denying extension of time for filing statement of facts, see **CERTIORARI**.

Duplicate statement to owner of materials furnished contractor, see **MECHANICS' LIENS**, 2.

STATES:

Public lands, see PUBLIC LANDS.

Investment of school funds in state capitol building bonds, see SCHOOLS AND SCHOOL DISTRICTS, 1.

1. STATES—BONDS—VALIDITY—STATE DEBT—LIMITATION—SUBMISSION TO VOTE. Laws 1913, p. 139, § 2, and Laws 1911, p. 323, § 5, providing that the state shall guarantee the principal and interest of the capitol building bonds to be issued against the capitol building fund, pledges the general credit of the state therefor, and hence involves the incurring of a state indebtedness in violation of the prohibition of the Const., art. 8, §§ 1-3; since the bonds provided for exceed the limitation of \$400,000, specified in § 1 for certain indebtedness, and do not fall within § 2 authorizing indebtedness to repel invasion and defend the state in war, and were not authorized by a vote of the people as required by § 3 in the case of all other state indebtedness. *State Capitol Commission v. State Board of Finance*..... 15
2. SAME—STATE INDEBTEDNESS — ASSETS — OFFSET. Where the state pledged its general credit for the payment of capitol building bonds to be paid from future sales of the capitol lands, the ascertained value of the capitol lands cannot be offset against the state obligation upon its pledge for the purpose of showing that the state had not in fact incurred any real indebtedness. *State Capitol Commission v. State Board of Finance*..... 15

STATUTES:

See BILLS AND NOTES, 1, 3; GAMING; LIBEL AND SLANDER, 1; LICENSES; MECHANICS' LIENS, 2, 3.

Construction of statute defining abortion, see ABORTION.

Control and disposal of public lands, see COLLEGES AND UNIVERSITIES.

Federal employers' liability act, see DEATH.

Statute of frauds, see FRAUDS, STATUTE OF.

Violation of statute prohibiting rebating, see INSURANCE, 1.

Of limitation, see LIMITATION OF ACTIONS.

Regulation of hours of service for employees, see MUNICIPAL CORPORATIONS, 4, 5.

Disposal of university lands, see PUBLIC LANDS, 1.

Consolidation of school districts, see SCHOOLS AND SCHOOL DISTRICTS, 2.

Change of venue, see VENUE.

STOCK:

Corporate stock, see CORPORATIONS, 1-7.

STOCKHOLDERS:

Of corporations, see CORPORATIONS, 1-7.

STREET RAILROADS:

Violation of rate regulations, see **CARRIERS**.

STREETS:

See **MUNICIPAL CORPORATIONS**, 10, 16-19, 21-24.

SUBMISSION:

Of bond issue to vote, see **COUNTIES**.

Of ordinance to referendum vote, see **MUNICIPAL CORPORATIONS**, 1, 3.

Of state bond issue to vote of people, see **STATES**, 1.

SUBROGATION:

Of surety on injunction bond, see **BONDS**.

1. **SUBROGATION—RIGHT TO PAYMENT—BY JOINT PURCHASER.** One of the joint purchasers of land, who advanced the sum necessary to make final payment, after judgment lien against one of the other vendees who was unable to pay his share, is entitled to be subrogated to the extent of such advances; as he is not a mere volunteer. *Ruuth v. Morse Hardware Co.*..... 361
2. **SUBROGATION—RIGHT TO—WRONGFUL ACTS OF AGENT—TRUSTEE EX MALEFICIO.** Where an insurance company, through the fraudulent acts of its agent in a trade of the company's capital stock for land was rendered liable, on rescission of the deal, for the value of part of the land which it had conveyed to an innocent purchaser, it is entitled to be subrogated to the rights of the agent, as a trustee *ex maleficio*, in and to certain notes given to the agent by the innocent purchaser in the course of the trade, and held by the agent or his assigns with notice of the fraud. *Fournier v. American Life and Accident Ins. Co.*..... 175

SUBSCRIPTIONS:

To corporate stock, see **CORPORATIONS**, 1-7.

SUIT MONEY:

Allowance and amount, see **DIVORCE**, 3.

SUMMONS:

In tax foreclosure proceeding, see **TAXATION**, 2, 4, 5.

SUPERSEDEAS:

On appeal, see **APPEAL AND ERROR**, 8.

SUPPORT:

Of child on divorce, see **DIVORCE**, 7.

SURPRISE:

As ground for continuance or amendment, see **CONTINUANCE**.

TAXATION:

See LICENSES.

Effect of special warranty in deed, as to delinquent taxes, see COVENANTS.

Liquor license, see INTOXICATING LIQUORS.

Invoking bar of statute to preclude defense of void tax title in ejectment, see LIMITATION OF ACTIONS.

Waiver of joinder of parties in action for tax deed, see PARTIES.

1. TAXATION—SALES—FRAUD—SETTING ASIDE DEED—DEFENSES. The statutory regularity of tax foreclosure proceedings is no defense to an action to set aside a tax judgment and deed fraudulently obtained by one whose duty it was to pay the tax. *Collins v. Hoffman*... 264
2. TAXATION—TAX TITLE—SETTING ASIDE—ACTIONS—EVIDENCE. Proof that an owner, since deceased, was not made a party to tax foreclosure proceedings and that no summons was published or any service made establishes *prima facie* that he had no actual notice of the suit. *Collins v. Hoffman*..... 264
3. TAXATION—FORECLOSURE—VALIDITY—DESCRIPTION OF LOTS. The fact that property was assessed on the tax rolls as in Squire city instead of in the town of Springdale, to which the name had been changed by legislative act, does not invalidate tax foreclosure proceedings, as against one who took the property by deed describing it as located in "Springdale, formerly Squire City." *Continental Distributing Co. v. Smith*..... 10
4. SAME—SUMMONS—NAME OF OWNER. A general county tax foreclosure being a proceeding *in rem*, it is immaterial, if the property is properly described, what name or names of the owners are used in the notice. *Continental Distributing Co. v. Smith*..... 10
5. TAXATION—FORECLOSURE SALE—FRAUD—SETTING ASIDE TAX TITLE. A tax foreclosure and sale is void where the certificate of delinquency was purchased by the secretary of a corporation while it was owner of the land, and transferred to a figurehead and foreclosed for his benefit in an action naming the corporation as owner, the secretary accepting service, without notice to or making a subsequent purchaser from the corporation a party or publishing the summons; since the purchase of the certificate by one in his position of trust was a violation of his duty and amounted to a payment of the tax. *Collins v. Hoffman*..... 264
6. SAME—FRAUD—DEFENSES—NEGLIGENCE OF OWNER. One charged with deliberate fraud in obtaining a tax title cannot defend on the ground of the owner's negligence in failing to defend the tax foreclosure. *Collins v. Hoffman*..... 264
7. TAXATION—SALES—REDEMPTION. Under Rem. & Bal. Code, § 7808, redemption from a tax sale to satisfy a local assessment must be

TAXATION—CONTINUED.

made within two years after the sale and within 60 days after the publication of notice of demand for a deed. *State ex rel. Abrashin v. Terry* 208

TELEGRAPHS AND TELEPHONES:

Telegram as guaranty of note, see **GUARANTY**.

TERMINATION:

Of tenancy, see **LANDLORD AND TENANT**, 2.

TIDE LANDS:

Preference right to purchase, see **PUBLIC LANDS**, 4-6.

TIMBER:

Oral contract for broker's commissions on sale of, see **FRAUDS, STATUTE OF**, 1-3.

Wrongful cutting, see **TRESPASS**, 3.

TIME:

Of alteration of note, see **ALTERATION OF INSTRUMENTS**, 2.

For taking appeal, see **APPEAL AND ERROR**, 6.

Extending time for filing statement of facts, see **APPEAL AND ERROR**, 10, 11.

Review of order denying extension of time to file statement of facts, see **CERTIORARI**.

For application for mandamus, see **MANDAMUS**, 3.

Furnishing duplicate statement of materials furnished, see **MECHANICS' LIENS**, 2.

Taking effect of referendum ordinance, see **MUNICIPAL CORPORATIONS**, 1.

Filing claim for breach of contract, see **MUNICIPAL CORPORATIONS**, 31.

Redemption from tax sale, see **TAXATION**, 7.

As essence of contract for sale of realty, see **VENDOR AND PURCHASER**, 1, 8, 9.

TITLE:

See **EJECTMENT**.

Covenant of warranty of title, see **COVENANTS**.

Acquisition by purchaser at execution sale pending condemnation, see **EMINENT DOMAIN**, 5.

Homestead as separate estate of husband, see **HUSBAND AND WIFE**, 3.

Of action against incompetent, see **INSANE PERSONS**, 2.

Subjecting after acquired title to lien of judgment, see **JUDGMENT**, 8.

Of lessor, see **LANDLORD AND TENANT**, 1.

To vacated street, see **MUNICIPAL CORPORATIONS**, 22, 23.

Tax titles, see **TAXATION**, 1, 2, 5, 6.

TORTS:

See FRAUD; LIBEL AND SLANDER; NUISANCE; TRESPASS.
Measure of damages, see DAMAGES.
Causing death, see DEATH.
Of employers, see MASTER AND SERVANT.
Claims "sounding in tort," see MUNICIPAL CORPORATIONS, 27, 29.
Right to subrogation on wrongful act of agent, see SUBROGATION, 2.

TRADE-MARKS AND TRADE-NAMES:

1. **TRADE-MARKS AND TRADE-NAMES — UNFAIR COMPETITION — AGREEMENTS.** Where a restaurateur having a long established business under the name of "Chauncy Wright's Cafe," took in a partner and they formed a corporation and did business under the name "Wright Restaurant Company," it is not unfair competition that Mr. Wright, after sale of his interest in the corporation, should reenter business in the same locality using his full name on the window, to the injury of the business of the corporation, where there had been no agreement that he should not reenter business or that the partnership or corporation should do business under the name "Chauncy Wright's Cafe," but the corporation had agreed to do business under its corporate name of "Wright Restaurant Company." *Wright Restaurant Company v. Wright*..... 230

TRANSCRIPTS:

Of record for purpose of review, see APPEAL AND ERROR, 4, 9-12.

TRESPASS:

1. **TRESPASS—INJUNCTION—USE OF TRACK BY RAILROAD.** In an action of trespass and for an injunction to prevent the dumping of shingle bolts on property preventing convenient ingress and egress, the decree will not be construed to prevent lawful use of a spur track by a public service corporation, which was not in question in the action. *Taylor v. Howell-Hill Mill Co.*..... 66
2. **TRESPASS—MEASURE OF DAMAGES.** In an action for a trespass causing inconvenience in depriving the owner of ingress and egress, it is error to assess damages for the full rental value of the property, rather than for the damage sustained because of the inconvenience suffered. *Taylor v. Howell-Hill Mill Co.*..... 66
3. **TRESPASS—CUTTING TIMBER—TREBLE DAMAGES—CASUAL OR INVOLUNTARY TRESPASS—INSTRUCTIONS.** In an action for trespass for willfully cutting timber, it is error to instruct that, if defendant removed down timber after notice to cease cutting and removing it, his acts as to such timber were voluntary and intentional; and to refuse to instruct that such removal, if done to save as much loss as possible, would not be evidence that the original trespass was wilful. *Rogers v. Kangley Timber Co.*..... 48

TRIAL:

See **NEW TRIAL**.

Exceptions or objections for purpose of review, see **APPEAL AND ERROR**, 2-4, 12.

Review of errors as dependent on presentation of same by record, see **APPEAL AND ERROR**, 9, 10.

Review of verdicts, see **APPEAL AND ERROR**, 15.

Review of errors as dependent on prejudicial nature of same, see **APPEAL AND ERROR**, 24.

Continuance of, see **CONTINUANCE**.

Of criminal prosecution, see **CRIMINAL LAW**.

Instructions as to damages recoverable under Federal employers' liability act, see **DEATH**.

Instructions as to casual or involuntary trespass, see **TRESPASS**, 3.

Place of trial, see **VENUE**.

Impeachment of witnesses, see **WITNESSES**, 2-4.

1. **TRIAL—RECEPTION OF EVIDENCE—MISCONDUCT OF COUNSEL—FACT OF LIABILITY INSURANCE.** In an action for personal injuries, it is reversible error for plaintiff's counsel to unnecessarily inject into the record evidence of a conversation in which the defendant admitted that he carried liability insurance and hence could not settle for the injury, and the error is not cured by striking out the evidence; especially where a second conversation was detailed with the apparent purpose of keeping the matter before the jury, which the court refused to strike out. *Birch v. Abercrombie*..... 486
2. **TRIAL—MISCONDUCT OF COUNSEL—STATEMENTS OUTSIDE RECORD—FAIR TRIAL.** The repeated use by counsel of abusive language charging appellant with theft and fraud, not supported by anything in the record, and tending to prejudice the minds of the jury, deprives the party of a fair trial, and the error is not cured by instructing the jury to disregard the statements of counsel. *Rogers v. Kangley Timber Co.* 48
3. **TRIAL—OBJECTIONS TO EVIDENCE.** An objection to a summons and complaint as "irrelevant, incompetent and immaterial" does not raise the point that the signature had not been sufficiently identified. *Benham v. Columbia Canal Co.*..... 110
4. **TRIAL—DIRECTION OF VERDICT—PROVINCE OF COURT AND JURY—QUESTIONS FOR JURY.** Upon a challenge to the sufficiency of the evidence to sustain a partial defense to the action, the court, upon properly denying the challenge, should submit that issue to the jury and take its verdict thereon, together with its verdict on the other defenses, and it is error to take the verdict upon the main defenses only, and then set the verdict aside and determine the remaining questions of fact without the aid of the jury. *Butterworth v. Brede-meyer* 524

TRIAL—CONTINUED.

5. **TRIAL—PROVINCE OF COURT AND JURY—DIRECTING VERDICT.** The court can withdraw the case from the jury and direct the judgment only where there is want of substantial evidence on some matter in issue material to be established, and not merely where a new trial could be ordered because against the weight of the evidence. *Davies v. Rose-Marshall Coal Co.*..... 565
6. **TRIAL—VERDICT—IMPEACHMENT AND EXPLANATION — AFFIDAVIT OF JUROR.** Where, in an action for damages, the evidence and instructions improperly submitted to the jury an item which was too remote and speculative to form the basis of a recovery, the error cannot be shown to be harmless by an affidavit of a juror that the item was not considered, as it would show disobedience to the instructions and be an impeachment of the verdict. *Purdy v. Sherman*..... 309
7. **TRIAL—INSTRUCTIONS—ERRORS CURED.** Erroneous instructions on the measure of damages are not cured by proper instructions, where the court excluded all the testimony to which the proper instructions could apply. *Kincaid v. Seattle*..... 617

TRUSTS:

Subrogation to rights of trustee *ex maleficio*, see SUBROGATION, 2.

UMPIRE:

Official interest of as affecting decision by, see ARBITRATION AND AWARD.

Official interest as affecting appointment of, see HIGHWAYS, 3.

UNIFORMITY:

Of license tax, see LICENSES, 2.

UNITED STATES:

Courts, see REMOVAL OF CAUSES.

UNLAWFUL DETAINER:

See LANDLORD AND TENANT, 3.

USURY:

1. **USURY—REMEDIES OF BORROWER—RECOVERY OF USURY PAID.** The common law right to recover usurious interest paid in excess of the rate allowed by law is not abrogated by our usury laws, Rem. & Bal. Code, §§ 6251, 6255, prohibiting the taking of interest in excess of twelve per cent per annum, and providing that if a greater rate of interest be contracted for, the contract shall not be void, but in any action on the contract the plaintiff shall recover only the principal less twice the amount of interest paid, and less the amount of all accrued and unpaid interest. *Lee v. Hillman*..... 408

VACATION:

See JUDGMENT, 2, 3.

Of order discharging guardian and settling final account, see GUARDIAN AND WARD, 2.

Of streets, see MUNICIPAL CORPORATIONS, 21-23.

Of tax title, see TAXATION, 1, 2, 5, 6.

VALIDATION:

Of submission of bond issue for various purposes as single proposition, see COUNTIES, 2.

VARIANCE:

Amendment on appeal to cure variance, see APPEAL AND ERROR, 13.

In action by tenant for unlawful entry of landlord, see LANDLORD AND TENANT, 6.

In action for injury to servant, see MASTER AND SERVANT, 20.

VEHICLES:

Licensing of by city, see LICENSES.

VENDOR AND PURCHASER:

Sale of real estate by broker, see BROKERS, 1, 2, 5.

Purchase of property pending condemnation proceedings, see EMINENT DOMAIN, 4, 5.

False representations inducing sale of land, see FRAUD.

Requirements of statute of frauds, see FRAUDS, STATUTE OF, 4.

Conveyances in fraud of creditors, see FRAUDULENT CONVEYANCES, 2.

Absolute deed as mortgage, see MORTGAGES, 1.

Title to vacated streets, see MUNICIPAL CORPORATIONS, 23.

Purchase of lands by city for cemetery, see MUNICIPAL CORPORATIONS, 25, 26.

Sale of state lands, see PUBLIC LANDS.

Transfer of ownership of personal property, see SALES.

Specific performance of contract, see SPECIFIC PERFORMANCE.

Subrogation to rights of joint purchaser, see SUBROGATION, 1.

Purchasers at tax sale, see TAXATION.

1. **VENDOR AND PURCHASER—CONTRACT—CONSTRUCTION—FORFEITURE—INDEPENDENT COVENANTS.** The vendor's covenant to furnish water is an independent covenant and does not militate against a forfeiture clause in the contract for failure to pay taxes, interest and a maintenance fee, and default in making improvements within a specified time, where time was made the essence of the contract: especially where the maintenance fee was due before there could be any substantial failure to furnish water, or the ground prepared to receive it. *Benham v. Columbia Canal Co.*..... 110

VENDOR AND PURCHASER—CONTINUED.

2. VENDOR AND PURCHASER—RESCISSION BY VENDOR—RIGHT TO RESCIND—INDORSEMENT OF NOTES AS COLLATERAL. The indorsement as collateral of notes given for the purchase price of land, does not prevent rescission by the vendor on the vendee's default, where the notes were subject to withdrawal and under the control of the vendor; nor where the right to rescind, if in abeyance, was revived by withdrawal of the notes and their return to the vendee. *Benham v. Columbia Canal Co.*..... 110
3. SAME—RIGHT TO RESCIND—SET-OFF. The vendor is not precluded from rescinding the contract on the default of the vendee, as provided in the forfeiture clause, on an account of a set-off which the vendee wanted applied on the contract, where the claim was disputed, the vendor never agreed to make the application, the contract called for payment in "lawful money" and the vendee had also broken his agreement to fence and improve the land. *Benham v. Columbia Canal Co.* 110
4. SAME—RESCISSION BY VENDOR—ACQUIESCENCE IN RESCISSION. A vendee acquiesced in a rescission, and cannot thereafter have a set-off applied in payment of the contract, where the vendor gave written notice of rescission and returned the notes, on the default of the vendee, who retained the notes and thereafter attempted by suit to collect the sum due on the set-off, and rested on his rights for three years until the land had trebled in value and part of it had been resold. *Benham v. Columbia Canal Co.*..... 110
5. VENDOR AND PURCHASER—REMEDIES OF PURCHASER—RESCISSION—FRAUD. A sale of a lot 50x105 feet will not be rescinded for falsely representing that the lot was 120 feet long, where the purchaser twice visited and inspected the lot, its boundaries were plainly marked on the ground, and there was no concealment or pointing out of false lines and no subterfuge and no fiduciary relations between the parties; since the principle of *caveat emptor* applies. *Conta v. Corgiat*..... 28
6. SAME—RESCISSION—ALTERNATIVE DAMAGES. Where a rescission of a sale of a lot for fraud of the vendor in misrepresenting the area is properly denied because of the application of the rule of *caveat emptor*, there can be no abatement of the purchase price as an alternative remedy by way of damages for a deficiency in the quantity of the land. *Conta v. Corgiat*..... 28
7. VENDOR AND PURCHASER—RESCISSION BY VENDEE—MISREPRESENTATIONS. Vendees are not entitled to rescission of contracts for the sale of land, for false representations that the lands would be irrigable by means of an irrigation project, which was mere promoter's talk and upon which nothing had been done, the vendees made their own investigation, and the parties were strangers to one another having equal means of knowledge; as the representations

VACATION:

See JUDGMENT, 2, 3.

Of order discharging guardian and settling final account, see GUARDIAN AND WARD, 2.

Of streets, see MUNICIPAL CORPORATIONS, 21-23.

Of tax title, see TAXATION, 1, 2, 5, 6.

VALIDATION:

Of submission of bond issue for various purposes as single proposition, see COUNTIES, 2.

VARIANCE:

Amendment on appeal to cure variance, see APPEAL AND ERROR, 13.

In action by tenant for unlawful entry of landlord, see LANDLORD AND TENANT, 6.

In action for injury to servant, see MASTER AND SERVANT, 20.

VEHICLES:

Licensing of by city, see LICENSES.

VENDOR AND PURCHASER:

Sale of real estate by broker, see BROKERS, 1, 2, 5.

Purchase of property pending condemnation proceedings, see EMINENT DOMAIN, 4, 5.

False representations inducing sale of land, see FRAUD.

Requirements of statute of frauds, see FRAUDS, STATUTE OF, 4.

Conveyances in fraud of creditors, see FRAUDULENT CONVEYANCES, 2.

Absolute deed as mortgage, see MORTGAGES, 1.

Title to vacated streets, see MUNICIPAL CORPORATIONS, 23.

Purchase of lands by city for cemetery, see MUNICIPAL CORPORATIONS, 25, 26.

Sale of state lands, see PUBLIC LANDS.

Transfer of ownership of personal property, see SALES.

Specific performance of contract, see SPECIFIC PERFORMANCE.

Subrogation to rights of joint purchaser, see SUBROGATION, 1.

Purchasers at tax sale, see TAXATION.

1. VENDOR AND PURCHASER—CONTRACT—CONSTRUCTION—FORFEITURE—INDEPENDENT COVENANTS. The vendor's covenant to furnish water is an independent covenant and does not militate against a forfeiture clause in the contract for failure to pay taxes, interest and a maintenance fee, and default in making improvements within a specified time, where time was made the essence of the contract; especially where the maintenance fee was due before there could be any substantial failure to furnish water, or the ground prepared to receive it. *Benham v. Columbia Canal Co.*..... 110

VENDOR AND PURCHASER—CONTINUED.

2. **VENDOR AND PURCHASER—RESCISSION BY VENDOR—RIGHT TO RESCIND—INDORSEMENT OF NOTES AS COLLATERAL.** The indorsement as collateral of notes given for the purchase price of land, does not prevent rescission by the vendor on the vendee's default, where the notes were subject to withdrawal and under the control of the vendor; nor where the right to rescind, if in abeyance, was revived by withdrawal of the notes and their return to the vendee. *Benham v. Columbia Canal Co.*..... 110
3. **SAME—RIGHT TO RESCIND—SET-OFF.** The vendor is not precluded from rescinding the contract on the default of the vendee, as provided in the forfeiture clause, on an account of a set-off which the vendee wanted applied on the contract, where the claim was disputed, the vendor never agreed to make the application, the contract called for payment in "lawful money" and the vendee had also broken his agreement to fence and improve the land. *Benham v. Columbia Canal Co.* 110
4. **SAME—RESCISSION BY VENDOR—ACQUIESCENCE IN RESCISSION.** A vendee acquiesced in a rescission, and cannot thereafter have a set-off applied in payment of the contract, where the vendor gave written notice of rescission and returned the notes, on the default of the vendee, who retained the notes and thereafter attempted by suit to collect the sum due on the set-off, and rested on his rights for three years until the land had trebled in value and part of it had been resold. *Benham v. Columbia Canal Co.*..... 110
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VENDOR AND PURCHASER—CONTINUED.

were not as to existing facts, but mere opinions based on hearsay. *Stewart v. Larkin*..... 681

8. **VENDOR AND PURCHASER—CONTRACTS — FORFEITURE— WAIVER — DEMAND.** After waiver of a provision that time was of the essence of a contract upon which all payments had been made except the last one, the vendor cannot declare a forfeiture until after demand and the lapse of a reasonable time. *Shorett v. Knudsen*..... 448
9. **VENDOR AND PURCHASER—CONTRACT—FORFEITURE—WAIVER.** The receipt by the vendor of all installments except the last one, some time after they became overdue, waives a provision making time of the essence of the contract. *Shorett v. Knudsen*..... 448
10. **VENDOR AND PURCHASER — CONTRACT — PERFORMANCE BY VENDEE— ABANDONMENT.** Abandonment by the vendee of a contract for land to be paid for by doing carpenter work, is not shown by the fact that the vendee returned an abstract of title on being unable to secure a loan to take advantage of a cash offer, where he had no such intention and held himself ready at all times to perform the services agreed upon. *Bendon v. Parfit*..... 645
11. **SAME—PERFORMANCE OR BREACH—FORFEITURE—CONCURRENT ACTS.** Vendors selling land in consideration of services to be rendered cannot put the vendee in default until they have offered to perform, the payment of the purchase price and delivery of the deed being concurrent acts. *Bendon v. Parfit*..... 645
12. **SAME—BONA FIDE PURCHASERS—POSSESSION AS NOTICE.** Actual possession of property by a vendee under an oral contract of sale, with knowledge that the vendee had made the improvements, imparts notice to a subsequent purchaser, who therefore is not an innocent purchaser. *Bendon v. Parfit*..... 645

VENUE:

Of action against corporation, see **CORPORATIONS**, 9.

Prosecution for libel published by nonresident, see **LIBEL AND SLANDER**, 2, 3.

1. **VENUE—RESIDENCE OF DEFENDANT—DOMICILE.** Under the rule that statutes should be liberally construed in favor of the jurisdiction where the suit is instituted, a defendant, sued in the county where domiciled and engaged in business at the time the cause of action arose, is not entitled to a change of venue under Rem. & Bal. Code, § 208, fixing the venue in the county of his residence, on a mere showing that, being a newcomer in the state, he intended to reside in another county, without ever having declared a residence or engaged in business therein. *Carr v. Remele*..... 380

VERDICT:

Review on appeal, see **APPEAL AND ERROR**, 15.

Inadequate or excessive damages, see **DAMAGES**, 2, 3.

Excessive verdict for unlawful entry of landlord, see **LANDLORD AND TENANT**, 4.

Directing verdict, see **TRIAL**, 4, 5.

VOTERS:

Submission of ordinance to, see **MUNICIPAL CORPORATIONS**, 1-3.

Submission of state bond issue to vote of people, see **STATES**, 1.

WAGES:

Minimum wage paid by contractors on public improvement work, see **MUNICIPAL CORPORATIONS**, 11.

WAIVER:

Of right to forfeit contract, see **CONTRACTS**, 10.

Of objections to validity of oral contract, see **FRAUDS, STATUTE OF**, 5.

By tenant of right to remove building, see **LANDLORD AND TENANT**, 5.

Of lien by taking promissory note, see **MECHANICS' LIENS**, 3.

Of conditions precedent to action against city for damages, see **MUNICIPAL CORPORATIONS**, 29.

Joinder of parties, see **PARTIES**.

Preference right to purchase tide lands, see **PUBLIC LANDS**, 5.

Of provisions of contract, see **VENDOR AND PURCHASER**, 8, 9.

WARDS:

See **GUARDIAN AND WARD**.

WARNING:

To servant of danger, see **MASTER AND SERVANT**, 7.

WARRANTS:

Mandamus to compel signing of, see **MANDAMUS**, 2.

WARRANTY:

Covenants of, see **COVENANTS**.

On sale of goods, see **SALES**, 1.

WHARVES:

1. **WHARVES—LEASE—ABANDONMENT—RIGHT TO EARNINGS.** Upon the abandonment of a wharf by a lessee, the lessor refusing the required consent to an assignment of the lease, the right to possession and subsequent earnings reverted to the original owner, as against the lessee and one claiming under it. *Bogart v. Sound Motor Co.* . . . 679

WITNESSES:

Testimony of ground for continuance or new trial, see CONTINUANCE.
Experts, see EVIDENCE, 4.

1. **WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEASED.** In an action for specific performance, brought by the administrator of the vendee's estate, the defendant cannot testify that he informed the decedent that the contract was forfeited, in view of Rem. & Bal. Code, § 1211, excluding the testimony of a party as to transactions with the deceased. *Shorett v. Knudsen*..... 448
2. **WITNESSES — CREDIBILITY — IMPEACHMENT.** In a prosecution for abortion, in which the prosecutrix testified that the accused told her that he inserted instruments for the purpose of relieving her of the child, medical testimony that she was at the time suffering from hysteria, which caused delusions and hallucinations is admissible as affecting her credibility. *State v. Pryor*..... 121
3. **WITNESSES—IMPEACHMENT.** On cross-examination of a prosecutrix, on a prosecution for accepting the earnings of a common prostitute, evidence that she had subsequently lived with another man and paid him all her earnings is not admissible to impeach her testimony, she having admitted that she was a common prostitute. *State v. Columbus*..... 290
4. **SAME.** Such evidence is not admissible on the theory that she was endeavoring to shield the other man, as her motive for testifying against the accused. *State v. Columbus*..... 290

WORK AND LABOR:

Liens for work and materials, see MECHANICS' LIENS.

WRITINGS:

Requirements of statute of frauds, see BROKERS, 2; FRAUDS, STATUTE OF.

Necessity of written order of architect for extras, see CONTRACTS, 7.
Parol evidence to vary, see EVIDENCE, 3.

WRITS:

See CERTIORARI; EJECTMENT; MANDAMUS; PROHIBITION.

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